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THE COMMERCIALIZATION OF CIVIL LAW AND THE CIVILIZATION OF COMMERCIAL LAW*

Boris Kozolchyk**

INTRODUCTION

This topic requires that one first clarify what is meant by civil law and by commercial law. One might be tempted to assert positivistically that civil law is the law found in civil codes and commercial law is the law found in commercial codes. Yet, legal history proves that it has been very difficult, if not impossible, to draft a code that applies exclusively to civil or commercial transactions. Even where the draftsmen of separate civil and commercial codes adopted what they thought to be neat lines of differentiation or scope criteria, it was clear, almost before the ink had dried, that they had failed in their attempts at separation.

The first to try separation was Napoleonic France with its so-called *objective criterion*,¹ a criterion followed by the majority of other civil law countries. The scope of the French Commercial Code of 1807 was determined by inquiring whether the parties had entered into "an act of commerce," such as, a purchase and sale of

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1. See L. GOLDSCHMIDT, *STORIA UNIVERSALE DEL DIRITTO COMMERCIALE* 166-88 (V. Pourchain & A. Torino trans. 1913) (lucid account of the development of French commercial law until the codification period); Litvinoff, *Book Review* (1 B. Kozolchyk & O. Torrealba, *Curso de Derecho Mercantil*), 17 ARIZ. L. REV. 1167 (1975) (dichotomy and unification of private law); Schlesinger, *The Uniform Commercial Code in the Light of Comparative Law*, 1 INTER-AM. L. REV. 11 (1959) (Napoleonic preservation of the commercial-civil dichotomy).

goods or merchandise for their resale, enterprises of manufacture, commission agency, transportation, public spectacles, exchange, banking and brokerage, construction, or maritime commerce, or whether the parties had signed or endorsed a promissory note or a bill of exchange.² By contrast, the *subjective* criterion defined the scope of a commercial code on the basis of the merchant's professional affiliation. A subjective commercial code applied only to those who qualified as habitual and professional merchants. This approach, which was implicit in the eighteenth century Prussian *Allgemeine Landrecht*, was expressly adopted by some of Germany's nineteenth century commercial codes and prevails in the German Commercial Code of 1900.³ The professionals chosen under the subjective criterion included predominantly bankers and traders. Primary producers were not included because they treasured their monopolistic status, inconsistent as it was with the competition principles of the commercial codes. Agricultural business was similarly uninterested in the competitive capitalism of the commercial code. Also exempted from the commercial characterization were those who thought better of themselves, such as members of the liberal professions, including physicians (however enterprising), actors, attorneys, authors, composers and teachers.⁴

By defining the commercial code as objective, the French codifiers attempted to avoid the stigma of conferring a privileged status to a class of citizens, anathema as privileges were to the revolutionary principle of equality before the law. Thus, in principle, the French Commercial Code applied to acts of commerce by merchants, as well as to those acts of commerce entered into by non-merchants, such as law professors, opera singers, or priests.

On the other hand, the French Civil Code dealt with matters such as a person's legal status, regulating that status from birth until death. Included in the regulation of a person's status were such aspects as: his domestic and family relations; his obligations, both contractual and extra-contractual; his non-profit associations; and his acquisition, use, and disposition, both *inter vivos* and *mortis causa*, of personal and real property. In addition, it provided principles of general application to transactions both within and beyond its confines, such as:

Laws relating to public order and morals cannot be derogated from by private agreement.⁵

2. See C. COM. art. 632 (Fr.).

3. See generally Freinfels, *The Problem of Including Commercial Law in a Civil Code*, in PROBLEMS OF CODIFICATION 90, 98-100 (Soltjar ed. 1977).

4. *Id.*

5. C. CIV. art. 6 (Fr.) (writer's trans.).

Contracts lawfully entered into have the force of law for those who have made them. They can only be cancelled by mutual consent or by causes allowed by law. They must be carried out in good faith.⁶

Possession is the equivalent of title with respect to personal property.⁷

Any human act which causes damage to another obligates the person through whose fault damage occurred to make reparation for the damage.⁸

The generality of these and other principles contributed to the civil code's status as the unofficial constitution of France's private law.

The problem with the objective-subjective dichotomy is that the life of the law in general, and of commercial life in particular, is not, as Justice Holmes continually reminds us, quite that syllogistic. One who disagrees with Holmes should try to define an act of commerce, such as "brokerage," without referring to the activity of the broker. To make sense you would have to define brokerage by describing brokers and vice versa; if you wish to define a broker, you must describe what he, as a broker, does. Moreover, consider the case of the so-called "mixed act," the act which is commercial for one of the parties, say the seller, and civil *i.e.*, not profit making, for the consuming buyer. Additionally, consider the act which starts out as a civil act on the part of the buyer, but becomes profit-making once the buyer realizes that he can profit by reselling that which he bought with the initial purpose of only consuming.

The difficulty of drawing a neat line between that which is civil and that which is commercial in everyday legal affairs does not mean that there are no significant differences between the rules, concepts, and principles of interpretation that characterize each of these major branches of private law. The differences emerge once one examines how civil and commercial law treat a simple, everyday transaction such as a sale or conveyance of valuable property. Accordingly, certain key aspects in the regulation of such an ordinary sale or conveyance will be examined first with respect to the French Civil Code of 1804 and related decisional and doctrinal materials and, subsequently, with respect to the United States Uniform Commercial Code and related decisional and doctrinal sources. The reason for the choice of codes is that, as the following sections will indicate, in many respects each code contains some of the most typical elements of a law-making tradition.

6. C. CIV. art. 1134 (writer's trans.).

7. C. CIV. art. 2279 (writer's trans.).

8. C. CIV. art. 1382 (writer's trans.).

THE CIVIL LAW CONTEXT

Formality and Exclusion of Parol Evidence

One of the first observable features of the civil law regulation of the simple transaction is its formality. If the conveyance is an inter vivos donation, it must be executed before a notary public.⁹ If it is an onerous transaction, as for example, where land or valuable property is conveyed for a price which exceeds 500 francs, either a notarial deed or a writing "under private signature" is required.¹⁰

As if to underscore the importance of the formal document, the French Civil Code states: "[N]o proof by witnesses against or beyond the content of the document, nor as to what is alleged to have been the content previously, at the time or since it was drawn up shall be allowed, even if the sum or value in dispute is less than 500 francs."¹¹ This is but a confirmation of a principle expressed elsewhere in the Code: "[A]n instrument in public form [that is to say, a notarial deed] is absolute proof of the agreement which it contains between the contracting parties and their heirs or legal representatives."¹²

The absolute proof feature that accompanies the solemnity of a notarial deed is so awe-inspiring that occasionally deeds are executed even when the parties know that the expressed obligations are unenforceable in a court of law. For example, in Central America, notarial deeds covenanting "love and support" are not uncommon. The promisor, usually a married man, notarially promises a doubting or hesitating mistress-promisee his love and support for as long as he lives. The notarially expressed intent thereby becomes an act of ultimate reassurance in the face of nagging distrust.

Application to Face-to-Face Transactions and to Immediate Parties

The second observable feature of the codal regulation of the chosen transaction is that if it resulted from correspondence between the parties, the Code provides very few, if any, rules through which to elucidate problems such as whether the mailing of the acceptance by the offeree, its reception by the offeror, or knowledge of its reception by the offeror is the time at which the acceptance becomes binding on the offeree.¹³ Little attention was paid by the

9. C. CIV. art. 931.

10. C. CIV. art. 1341.

11. C. CIV. art. 1341 (writer's trans.).

12. C. CIV. art. 1319 (writer's trans.).

13. For a comparative discussion of some of the French Civil Code's shortcomings in the regulation of contract law, see Von Mehren, *The Code and Contract—A Comparative Analysis of Formation and Form*, in *THE CODE NAPOLEON* 110-11 (B. Schwartz ed. 1956).

codifier to contracts by correspondence or *inter ausentes*. Moreover, the codifier, while seeming to accept the concept of third party beneficiary promises, limited them seriously. One of the limitations, interpreted literally, prohibits an insurance contract covering the value of conveyed property, where the assured was liable to pay the premiums and the beneficiary was entitled to the indemnity.¹⁴

Cause or the Reason for the Validity of Contractual Obligations

The Morality of Cause

Surprisingly for a common law lawyer, the promise to convey, gratuitously, valuable real or personal property is valid and enforceable as long as the required formalities are met.¹⁵ The promisee need not allege estoppel or detrimental reliance on the promise. The promise is said to have a valid cause or basis for validity. The basis for validity in a donation is the donative intent or a mere liberality.¹⁶ The mere liberality of the gift can be questioned as a valid cause, however, where the conveyance is to a "stranger" such as the grantor's mistress; in such a case, a distinction may be drawn between the stated and the impulsive cause.¹⁷ If the contract is bilateral or synallagmatic, the basis for its enforceability from each party's standpoint is the other party's obligation. This seeming reciprocity of value constitutes the contract's cause.¹⁸

The Code is concerned with the morality of cause in both gratuitous and onerous contracts. It defines an illicit cause which renders the obligation void as one not only prohibited by law but also contrary to "good morals" and "public order" (*ordre public*).¹⁹ A 1957 decision by the *Cour de cassation* illustrates the meaning of the term "good morals."²⁰ A French middle-aged, middle-income father of a family, possessed of a modest estate and a lusty sexual appetite, conveyed the beneficial interest in his group life insurance policy to a recently-acquired mistress. His widow and heirs sued the mistress alleging the nullity of her designation as beneficiary. The trial and appellate courts held that there was an immoral cause in the conveyance.²¹ This finding, Professor Esmein tells us, is related to the

14. 2 M. PLANIOL, *TRAITÉ ELEMENTAIRE DE DROIT CIVIL* § 635 (3d ed. 1948), cited in Von Mehren, *supra* note 13, at 111 n.2.

15. C. CIV. arts. 894 & 1105.

16. C. CIV. arts. 894, 1105, 1108 & 1131.

17. For a brief and up to date review of the morality of cause in gratuitous contracts, see A. WEILL ET F. TERRE, *LES OBLIGATIONS* n^{os} 280-81 (2d ed. 1975).

18. *Id.* at n^{os} 254-55.

19. C. CIV. art. 1133.

20. Judgment of 8 oct. 1957, Cass. civ., D.1958.J.317 at 318.

21. *Id.*

well-established case law in accordance with which a donation in favor of a concubine is not *per se* invalid . . . as it can be valid in the case of adulterous relationships. It is null, however, for an immorality of the cause, when, appearing to be a donation, it is in reality the payment of a price to bring about or to secure the continuation of the concubinage.²²

This rationale could be seen as reflecting a judicial respect only for the purest or the most virile variety of seduction, a distaste for disguised forms of prostitution (*pretium stupri*), or both. Be that as it may, the net effect of the ruling is to discourage conveyances detrimental to one's widow and heirs; for, unless the designated beneficiary could prove that she was conquered only by the grantor's unadulterated erotic powers, the illicitude of the cause would invalidate the conveyance.

Professor Capitant's classic study on cause in French and comparative law discusses similar decisions concerning real property rented for purposes of prostitution or for the operation of gambling houses and agreements involving the bribing or corruption of public officials.²³ The courts' distaste for such agreements can best be gauged by their unwillingness to order restitution so as to bring about the status quo ante. As expressed by an indignant court in Bourges in 1889, "such parties are not worthy of appearing before a court of law."²⁴

What is the moral or religious basis of this indignation? Demogue argued that "good customs," as the basis of the morality of the cause, should be based upon public opinion.²⁵ Dean Ripert argued in favor of moral or theological foundations which one can not fail to associate with Judeo-Christian principles of ethical behavior.²⁶ And Professor Esmein posited that the morality of cause, at least when predicated on the notion of public order, is a malleable concept adaptable to the changing times and needs—a concept shaped by the judge, not by relying upon his own theology, philosophy or personal bias, but inspired by the morality of the entire corpus of law as it relates to the controversy.²⁷

22. Esmein, *Note* accompanying Judgment of 8 oct. 1957, Cass. civ., D.1958.J.317 at 318 (writer's trans.).

23. H. CAPITANT, *DE LA CAUSE DES OBLIGATIONS* 226-27 (3d ed. 1927).

24. Judgment of 13 juin 1889, Bourges, D.P.1889.5.329 (writer's trans.), *cited in* H. CAPITANT, *supra* note 23, at 243 n.2.

25. 2 M. DEMOGUE, *TRAITÉ DES OBLIGATIONS EN GENERAL* n° 773 bis. (1912), *cited in* G. RIPERT, *LA RÈGLE MORALE DANS LES OBLIGATIONS CIVILES* n° 41 n.2 (3d ed. 1935).

26. G. RIPERT, *supra* note 25, at n° 39.

27. Esmein, *Note* accompanying Judgment of 4 déc. 1929, S.1931.1.49, *transcribed in* H. CAPITANT, *LES GRANDS ARRÊTS DE LA JURISPRUDENCE CIVILE* 10-12 (5th ed. 1970).

An examination of the French decisions up until 1930, compiled by Dean Ripert, indicates that French courts agreed at times with one and at other times with all of the above criteria.²⁸ Yet, whatever the court's formulation of the criterion, the morality espoused was always consistent with that of a good father of a family.²⁹ This meant a requirement of loyalty above all to his wife and children, including protection and sustenance in accordance with his means and station in life, and refraining from outrageous, ill-mannered, or grievous conduct toward his family. As will be shown hereafter, such a morality did not require a mutuality in obligations entered into with non-family members; nor did this morality mandate an equivalence, however approximate, of the values exchanged by promisor and promisee in non-family obligations.

Cause, Lesion, and Just Price

An exchange of a rough equivalent of value between promisor and promisee was a requirement only when the seller had sold real property and received a price of less than seven-twelfths of the market value of the property. The Code provides that if the vendor suffered a loss of more than seven-twelfths of the price of a piece of property, he may demand rescission although he expressly donated the excess.³⁰ One should note that the Code refers in this regard only to the vendor, who alone is afforded the privilege of rescission.

The protection from "objective" lesion, the significant disproportion between exchanged and received value as measured by what was given by the promisee or what he was led to believe he would receive as an heir, was intended by the Code to apply to family property. By family property is meant property of significant economic value in the composition of the family estate. The tenor and scope of the French Civil Code's provisions on lesion are clear: articles 1118 and 1313 limit the availability of rescission because of lesion to expressly designated legal relationships. With the sole exception of the seller of real property who receives less than one-half of the market price, the designated legal relationships are all familial in nature, such as those between a decedent and his heirs, or between legatees and devisees as a result of an improper division or due to events supervening the acceptance of the inheritance share.

28. G. RIPERT, *supra* note 25, at n^{os} 26-30.

29. See, e.g., C. CIV. arts. 212-14, 231, 442 & 450. The influence of the morality of a good father of a family is apparent in the invalidation of certain contracts between parties in a relation of professional dependence. It is also apparent in decisions where family relations such as matrimony have been held not subject to commercial brokerage because such brokerage is "dominated by the ideas of commercial traffic and speculation." G. RIPERT, *supra* note 25, at n^o 27 (writer's trans.).

30. C. CIV. arts. 1674 & 1683.

The "subjective" doctrine of lesion, which considered the exploitation of the promisee's contractual weakness and particularly his lack of bargaining power, was not adopted by the French Code Civil, as it was by the German Civil Code of 1900.³¹ As noted by Dean Ripert, the French Civil Code had not provided a remedy for the case of contractual weakness other than the "somewhat brutal theory of incapacity or the hazardous theory of vice of consent."³² Objective lesion was one of the most important instances in which Pothier's views had been overruled by the French Civil Code draftsmen. Pothier had stated in his *Treatise on Obligations*:

[E]quity must govern contracts and when one of the parties suffers lesion, even though the other did not bring it about by trick or artifice, it is, in itself, sufficient to render the contract vitiated. Because equity in commerce consists of equality, and where such equality is destroyed and one of the parties gives more than he receives, the contract is vitiated.³³

One should hasten to point out that the warranty the Code requires from the vendor against hidden defects of the thing sold³⁴ is not a substitute or functional counterpart for lesion. Lesion is intended to apply to a sale even where, in the absence of a hidden or latent defect, there is a significant or gross disproportion in exchanged value.

The codal disregard of Pothier's point of view represented, first, a conscious desire to reject what was regarded as the medieval economic theory on a just price and, secondly, an adoption of the principle that restrictions on contractual freedom have detrimental effects upon commerce, a principle held in common by Locke, Bentham, the Physiocrats, and Turgot.³⁵

At this point it is appropriate to review the findings of a 1958 study on the medieval meaning of just price by R. de Roover,³⁶ a distinguished historian of medieval thought. According to de Roover, there were two influential medieval views on just price. One view, which he attributed to Henry of Langenstein, held that a just

31. The best comparative analysis of the development of the modern French and German views on lesion is still by Dawson. See Dawson, *Economic Duress and the Fair Exchange in French and German Law*, (pt. 1) 11 TUL. L. REV. 345, 364-76 (1937); (pt. 2) 12 TUL. L. REV. 42, 49-53 (1937).

32. G. RIPERT, *supra* note 25, at n° 102 (writer's trans.).

33. R. POTHIER, OBLIGATIONS n° 33 (1802) (writer's trans.), cited in G. RIPERT, *supra* note 25, at n° 62.

34. C. CIV. art. 1641. Cf. LA. CIV. CODE arts. 2520-40 (dealing with redhibitory vices).

35. G. RIPERT, *supra* note 25, at n° 62.

36. de Roover, *The Concept of a Just Price: Theory and Economic Policy*, 18 J. ECON. HIST. 418 (1958).

price was the reasonable charge which would allow the producer "to live and to support his family on a scale suitable to his station in life."³⁷ If the producer charged more for his labor and expenses than would enable him to maintain his status (*per quanto res suas vendendo statutum suum continuare possit*), he committed the sin of avarice. Max Weber attributed to this view the moral foundation of the guild system (*nahrungsprinzip*). The other view, attributed to Albert Magnus and Saint Thomas Aquinas, among others, and far more widespread in Europe because of its adoption in canon law sources, appears in a thirteenth century directive to parish priests: flocks should be admonished not to charge wayfarers more than the price obtainable in the local market (*quam in mercato vendere possint*); otherwise, the wayfarers can complain to the priest who is then required to set the price with "humanity."³⁸ The same reference to the market appears in Albert Magnus' definition of the just price as a price "according to the estimation of the market"³⁹ (*secundum aestimationem fori*). This reference to market appears again in Aquinas' answer to the hypothetical question: May a merchant sell wheat at a prevailing price, or should he announce to his buyers the possible arrival of new wheat which may cause the present price to fall?⁴⁰ Although Aquinas himself would have announced the possible arrival of wheat, the seller in his hypothetical is not obligated to do so.

It is conceivable that what Albert Magnus meant by *fori* or market was not merely the actual market price but the price established by priests or by men of "humanity" as overseers of market transactions.⁴¹ Be that as it may, it should be clear that,

37. *Id.*

38. *Id.* at 421.

39. *Id.* at 422.

40. *Id.*

41. Dawson, *supra* note 31, (pt. 1) at 365 (referring to the *communis estimatio* "of informed and reputable members of the community"). R. H. Tawney reverts to the view that de Roover attributes to Max Weber:

The dominant conception of Aquinas—that prices, though they will vary with the varying conditions of different markets, should correspond with the labor and costs of the producer as the proper basis of *communis estimatio*, conformity with which was the safeguard against extortion—was qualified by subsequent writers. In the fifteenth century St. Antonino . . . concluded that the fairness of price could at best be a matter only of probability and conjecture, since it would vary with places, periods and persons. His practical contribution was to introduce a new elasticity into the whole conception by distinguishing three grades of prices—a *gradus pius*, *discretus* and *rigidus*

R. TAWNEY, RELIGION AND THE RISE OF CAPITALISM 41 (1961).

Ripert, like de Roover, refers to the Aquinas-Albert Magnus theory as an influential view, but also acknowledges the influence of a three-partite view on the just price (*summu*, *medium* and *infimu*) and on canonic and pre-code lay law. G. RIPERT,

prior to the enactment of the Code, there was a religious and secular body of thought favoring the imposition of a just price and disregarding contractual stipulations especially where there was a sharp disparity between contract and market price. It should also be clear that this tradition was rejected by the draftsmen of the French Civil Code in all instances except in the law of decedents' estates and in the sale of real property for less than seven-twelfths of its market price, since it was thought that a just price was detrimental to commerce.

Lack of Concern for Third Party Rights

The French Civil Code's concern for the integrity of the family estate is matched by its lack of concern for third party rights, even where the property involved is that which the Code considered most valuable. Thus, while the possessor of the less valuable movable property (*res movilis, res vilis*) was said to have a right equivalent to title, the purchaser or mortgagee of real property was, up until 1855, subject to secret or unrecorded liens and transfers.⁴² This situation prevailed in large measure as a result of the legal effect attributed to the will of the contracting parties. By establishing that the parties' agreement was sufficient to effect the transfer of title to property, article 1138 of the French Civil Code had accomplished more than merely the "enfranchising" of the will of the parties. It had also done away with the formal requirement of *traditio*, a formality which in Roman times provided a modicum of notice and protection

supra note 25, at n° 68. Regardless of the view on what is the just price, as pointed out by Dawson, following the first world war French court decisions involving the effects of inflation on monetary obligations made it abundantly clear that relief for inadequacy of the price did not depend on a presumption of mistake or economic pressure, but that the Code had given only a partial expression "to a principle which deserved its own place in private contract law." Dawson, *supra* note 31, (pt. 1) at 375.

42. See generally Kozolchyk, *The Mexican Land Registry: A Critical Evaluation*, 12 ARIZ. L. REV. 308, 312-13 (1970). For an illuminating description of the abolition of the real property law of the *ancien regime* and the process of elaboration of codal rules, see P. SAGNAC, *LA LEGISLATION CIVILE DE LA RÉVOLUTION FRANÇAISE: (1789-1804)*, at 85-213 (1898). The following quote, attributed to Bigot de Preameneu, who opposed the pre-codal system of protection of third party rights, is characteristic of the codal attitude toward third party rights, "individual liberties" and "family secrets": "Le système de publicité est une interdiction aux familles de garder le secret de leurs affaires . . . Ce secret a toujours été regardé comme un des principaux droits de la liberté individuelle . . ." See 15 P. FENET, *RECUEIL COMPLET DES TRAVAUX PRÉPARATOIRES DU CODE CIVIL* 237 (1827). Speaking in favor of the principle of immediate transfer of ownership upon execution of an agreement of sale, Tronchet stated: "He who buys does not require that the law adopt special measures for his safety. He has the title before his eyes. He can verify the vendor's possession." 1 M. PLANIOL, *CIVIL LAW TREATISE*, pt. 1, n° 2607, at 543 (La. St. L. Inst. trans. 1959).

to third parties.⁴³ Since the contract of sale created, modified, or extinguished rights in rem, regardless of recordation, a mortgagee who had advanced monies on land on the basis of his mortgagor's recorded ownership could still be subject to an earlier unrecorded transfer of ownership.⁴⁴

Mutatis mutandis, he who was the protected owner could "enjoy and dispose of things in the most absolute manner, provided that they are not used in a way prohibited by law or regulations."⁴⁵ The problem with the owner's perception of this provision is that it encouraged such unneighborly and selfish behavior that it became necessary for the courts, in partnership with doctrine, to develop restraints on "abuses" of rights.⁴⁶ Neighbors were told that they could not erect fake chimneys simply for their nuisance value, nor could they erect spires with which to prevent the landing of zeppelins on adjoining property in order to extort a higher price for their own property. As with the immorality of contractual cause, French courts had to resort, in Professor Cueto-Rua's words, "to general or accepted principles of good faith, or of positive morality, or [to] a widely recognized criterion of elementary fairness when imposing restraints on one's use of property."⁴⁷

The Fairness of "Contractual" Justice

Dean Ripert, in his classic monograph *The Moral Rule of Obligations*, quotes a cryptic but revealing description of what "justice" meant for the draftsmen responsible for the codal provisions on contracts: "All justice is contractual, stated simply; he who says contract says justice."⁴⁸ The meaning of contractual justice can best be perceived against a totalitarian background in which most men are simply not free to create binding obligations without official approval or intermediation. Under such circumstances the assertion of article 1134 of the French Civil Code that "contracts lawfully entered into have the force of law between the parties" is more than

43. On the abstract or third party protection features of *traditio*, see R. SOHM, *INSTITUCIONES DE DERECHO PRIVADO ROMANO* 159-60 (Sp. trans. 1951).

44. Kozolchyk, *supra* note 42, at 313.

45. C. CIV. art. 544 (writer's trans.).

46. English speaking students of the doctrine of abuse of rights should be grateful to the Louisiana Law Review for various fine articles on the subject. See Bolgar, *Abuse of Rights in France, Germany and Switzerland: A Survey of a Recent Chapter in Legal Doctrine*, 35 LA. L. REV. 1015 (1975); Cueto-Rua, *Abuse of Right*, 35 LA. L. REV. 965 (1975); Herman, *Classical Social Theories and the Doctrine of "Abuse of Right"*, 37 LA. L. REV. 747 (1977).

47. Cueto-Rua, *supra* note 46, at 996.

48. "Toute justice est contractuelle, écrit-il simplement; qui dit contractuelle dit juste." G. RIPERT, *supra* note 25, at n° 22 (writer's trans.).

a statement of the binding effects of a contract; it is also a political affirmation of the citizenry's power to enter into *all* lawful contracts—as equals.⁴⁹ In this sense also, *pacta sunt servanda* is not merely a moral admonition, but becomes a cardinal principle of autarchy and fairness. Contracts ought to be enforced as agreed upon because “[i]l faut donc affranchir l' homme. Il faut dégager de ses entraves la volonté humaine.”⁵⁰ In sum, the prevailing codal ideology espoused the view that contracts were not merely the repositories of the parties' intent but also of their binding conception of what was fair for each transaction.⁵¹ These contracts were indeed perceived as having been written in stone tablets.

Contractual justice discouraged resort to parol evidence to establish the parties' course of dealing, usage of trade or custom. It supported a notion of cause in bilateral or synallagmatic contracts which required no determination of mutuality or of equivalence of exchanged values, but merely a correspondence between what the contract stated and what was given and exchanged. Contractual justice also required good faith in the performance of obligations. However, good faith was measured in most contracts not by what other promisors, including an ideal promisor, would have done or given, but by the observance of written stipulation. Accordingly, the equality of rights to enter into contracts was confused with the factual equality of bargaining power; it was assumed that the former necessarily entailed the latter.⁵²

Finally, contractual justice accorded preference to the rights of

49. For the doctrinal influences on the text of article 1134, see A. ARNAUD, *LES ORIGINES DOCTRINALES DU CODE CIVIL FRANÇAIS* 204-05 (1969).

50. P. SAGNAC, *supra* note 42, at 22.

51. There is support in medieval religious law for the proposition that a fair price is reached by the mere fact that a bargain has been struck. See R. TAWNEY, *supra* note 41, at 42. In addition, as pointed out by Weill and Terre with regard to the notion of cause, legal doctrine, since the sixteenth century, generally eschewed the use of concepts which, by giving greater power to the judges, would compromise the stability of contract. A. WEILL ET F. TERRE, *supra* note 17, at n° 253.

52. See generally Bolgar, *The Contract of Adhesion*, 20 AM. J. COMP. L. 53 (1968), where it is stated:

But in the field of contracts, the Court of Cassation steadfastly clings to the letter of article 1134 . . . and disregards the requirement expressed further in this article—namely, that [contracts] should also be performed in good faith. Doctrinally this trend is justified by considerations of legal security that would, in addition, upset standing economic relations through arbitrary judicial power. Consequently, the Court almost invariably reverses the more liberal decisions of the lower courts rendered under their famous *pouvoir souverain d'appréciation*—a sovereign power of interpretation which, however, extends only to the interpretation of facts—on the ground that considerations of equity would “denaturalize” the clear and precise terms of the original contract.

Id. at 67-68.

the parties to the contract, over the rights of third parties who acted in reliance on appearances created by the parties to the contract. Thus, a mortgagee who advanced monies in reliance on what appeared to be the mortgagor's good title could be defeated by a sale of the mortgagor's property subsequent in time to the mortgage. Similarly, a purchaser from an agent who acted with apparent authority could have been affected by secret and undisclosed contractual limitation on the powers of the agent.⁵³

Interestingly enough, the power given to private parties to create justice by means of contractual stipulations did not carry over into the actual process of adjudication. Once the contract was breached, the remedies were overwhelmingly judicial; self-help or extrajudicial rescission, resale, or repurchase, when not disallowed, were considerably curtailed.⁵⁴ The Code did not trust the parties to act as informal adjudicators of their own contractual controversies; during trial, it did not trust the parties to tell the truth or to testify objectively.⁵⁵

53. See C. CIV. art. 1998; R. SCHLESINGER, *COMPARATIVE LAW* (1970), where it is stated:

The French Civil Code in its article 1984 uses the terms "mandat ou procuration" as synonymous and interchangeable. This method of treating the agent's *power* (to create rights and duties directly for the principal) merely as a byproduct of the contractual relationship existing between principal and agent has been severely criticized as unsystematic. Planiol, one of the leading French authors, has been among the critics.

R. SCHLESINGER, *supra*, at 537. In a note to *Banque canadienne nationale c. Directeur général des impôts*, Judgment of 13 déc. 1962, Cass. ass. plen., D.1963.1.277, Professors Weill and Terre note that this 1962 decision is the first formal occasion in the Plenary Civil Branch where the principle of autonomy or separation of the powers ostensibly or apparently granted to the agent from those powers in the underlying transaction has been recognized.

See A. WEILL ET F. TERRE, *supra* note 17, at n° 253; 2 J. CARBONNIER, *DROIT CIVIL* n°s 134-136 (1957).

54. Compare C. CIV. art. 1184 (general rule) with C. CIV. arts. 1657-58. Note the limitations placed on rescission as a matter of right in article 1657. Existing only in favor of the vendor, it operates only after the buyer's failure to remove the thing sold. For a historical analysis of the remedy of rescission in French civil law, see G. BOYER, *RECHERCHES HISTORIQUES SUR LA RÉSOLUTION DES CONTRATS* 171 (1924), cited in 1 M. SATANOWSKI, *ESTUDIOS DE DERECHO COMERCIAL* 214-20 (1968).

55. See NEW CODE OF CIVIL PROCEDURE IN FRANCE (F. Kerstrat & W. Crawford trans. 1978), where it stated:

[T]he parties themselves ordinarily are not eligible to be heard as witnesses. Their statements can be heard by the court if the court finds it necessary to hear them, but it will be in the context of a step different from that of the *enquête*, and it is in fact rather unusual to order it. It is known as the *comparution personnelle des parties*.

Id. at xxvii.

For a very interesting description of the procedural principles that governed the testimony of witnesses and disqualification of parties prior to the *Code de Procedure Civile du 8 octobre 1824*, see M. BOICEAU, *TRAITÉ DE LA PREUVE PAR TEMOINS EN*

Archetypes of Civility: The Selfish Man of Property and the Good Family Man

The preceding enumeration of features makes it possible to sketch the main characteristics of the model participant in our simple transaction. He is as comfortable with formalism and face-to-face transactions as he is uncomfortable with, and distrusting of, informality and *inter ausentes* communications. He is a stickler for his rights, to the point of abuse. He is wise and sufficiently well-mannered not to get his property involved in the business of prostitution or of gambling; yet he is unscrupulous enough to charge whatever he can get for what he sells, or as little as he can pay for what he buys (with the exception of real property). He is not to be trusted as an informal adjudicator of a breach of a sales agreement in which he is the aggrieved party, nor as a witness in his own lawsuit. For lack of a better term, I will refer to this civil code man as the selfish man of property.

Side-by-side with this selfish man of property in the Code stands someone who no less of a cynic than Voltaire described as virtuous and sage—the father of the family. Get your soldiers married, advised Voltaire, and they will not desert you. In 1801, the “Institute de France” announced a contest on the theme, “What should be the limits of the powers of a good father of family in a well constituted republic?” An authoritative chronicler quotes a representative contest submission for the following proposition: “The sentiment of obedience is necessary in the French family. What is a more appropriate means for instilling it than paternal authority? Paternity is a sacred function; to disobey it is a sacrilege. Paternal power should have the same force attributed to the Supreme Being.”⁵⁶ The Code in large measure agreed with Voltaire’s description and with the quoted submission. As enacted, article 213 of the Code proclaimed: “The husband owes protection to his wife, and the wife owes obedience to her husband.” In addition, the father of the family was entrusted with enormous powers over the lives and estates of his dependents, including the power to incarcerate.⁵⁷ In exchange, he not only acquired the obligations of a usufructuary, but also, among others, the obligation of feeding, supporting and educating his children in accordance with available means.⁵⁸ As a manager of his

MATIERE CIVILE 50, 241-42 (1789), where it appears that in large measure the question of the credibility of participants in various transactions is, and has been since the time of the medieval doctors, influenced by the fear that the transactions may be simulated or fraudulent.

56. P. SAGNAC, *supra* note 42, at 353.

57. See, e.g., C. CIV. arts. 376-79, 384.

58. See, e.g., C. CIV. art. 385.

dependent's estate, he was to act as a careful investor, employing a degree of diligence higher than that required of an average person or tradesman.⁵⁹

Even Planiol, a "no nonsense" code interpreter, in a most positivistic mood in which he indulged while writing a manual for practicing lawyers, found it necessary to describe the father of the family's obligation of support as

[one] that rarely emerges from contract; in some instances it arises from a will but most frequently it emanates from the law, which imposes it on specified persons. When sanctioning this obligation the law takes into account the moral duty to help one's own[.] [E]ven if the law fails to express this obligation it still constitutes a moral or natural obligation.⁶⁰

The selfish man of property and the father of the family, therefore, live under sharply contrasting standards of fairness. The standard that prevails for the family man when required to care for the members of his family is as described in an earlier study by this writer—brotherly.⁶¹

He must treat the business of family members which is under his care not only as well as he would treat his own business, but in some instances even better. His duties, as Planiol reminds us, have nothing to do with contract or with monetary reward. In protecting "his own," his duties rise above those that prevail in market place transactions. As will be recalled, the standard of fairness of the selfish man of property is often less demanding than that of the marketplace; pursuant to contractual justice, the standard of fairness is measured by what a party to a formal contract can get away with, even if it is "unmerchutable."⁶²

General Principles and Civil Law Adjudication

The crucial question in determining what is representative of the civil law treatment of our simple transaction is whether these two creatures, the selfish man of property and the father of the family, merely coexist, each fully ignoring the other, or whether they influence each other. Skeptics on the human condition should find some reassurance in the father of the family's exercise of a

59. Compare C. CIV. arts. 389, 450 & 457 with C. CIV. art. 1927 (setting forth the diligence of a bailee) and arts. 1991-92 (diligence of an agent).

60. 2 M. PLANIOL, *TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS* n° 19 (2d ed. 1952) (writer's trans.).

61. Kozolchyk, *Fairness in Anglo and Latin American Commercial Adjudication*, 2 B.C. INT'L & COMP. L. REV. 219 (1979).

62. See text at note 52, *supra*.

modicum of influence on the behavior of his selfish Civil Code brother.

A mild influence is apparent in those instances where the Code requires various contracting parties or estate holders to behave as "a good father of family," as where they are supposed to employ whatever means or resources are at their disposal (*obligations de moyens*). As stated by Dean Carbonnier,

[i]n such cases, . . . the contractual fault cannot be deduced merely from the absence of a *promised* result. The debtor's conduct must be evaluated against what he should have done under the circumstances. Article 1137 provides the formula for comparison. It was intended for contracts involving the preservation of identified objects such as sold goods prior to their shipment, or for leased, or pledged goods. Here the contractual debtor must act as a good father of family. The *bonus pater familias* is a careful and diligent man, an average man who is aware of his responsibilities. He is responsible for slight or light fault but not the slightest or lightest fault; that is to say, he is responsible for *culpa levis in abstracto*.⁶³

The good father of the family's influence may be described as mild in the above instances because it does not require the selfish man to refrain from taking undue advantage of the other party's contractual weakness or inexperience, nor does it require him to behave in a truly brotherly fashion. The brotherly standard can be found in the judicial interpretation of the code's general, almost proverbial, principles in the areas of torts and unjust enrichment.⁶⁴

As insightfully observed with regard to the code's tort provisions by André Tunc, an illustrious predecessor in the Tucker lecture series,

[o]ne may quarrel with the famous saying of Kant defining law as the means to assure "the coexistence of freedoms." Society is not merely a coexistence of free individuals. It is also built on a solidarity within a community of citizens. Life in society does not only restrict the otherwise unlimited freedom that we would enjoy if we were alone (assuming man could live alone), it also entitles us to some form of brotherhood. The aim of law,

63. 4 J. CARBONNIER, DROIT CIVIL—LES OBLIGATIONS n° 75 (1976) (writer's trans.) (emphasis added).

64. For the key general principle of the law of torts, see text at note 8, *supra*. For the general principles of unjust enrichment, see C. CIV. arts. 1372-80. Among other obligations imposed upon the *negotiorum gestor* or manager of someone else's affairs is that of continuing the management up until the time his principal's heir can assume the management if the principal has died. The manager is in all cases under the duty to use the standard of care of a good father of the family (*bon père de famille*).

therefore, is not only to protect and harmonize our freedoms, but also to permit and promote the development of our personalities . . . [T]his is especially true of the law of civil liability [i.e., torts]. Its main purpose is to harmonize the relations between persons who have no special tie between them.⁶⁵

Tunc concludes that the French Civil Code's generic and open-ended definition of tort has served this purpose by governing a range of conduct as broad as "the lives of tenants in a collective building and the conduct of large corporations engaged in fierce competition with each other."⁶⁶

Similarly, the open-ended nature of the provisions for *negotiorum gestio* and payment of a *not due* obligation—the two bases for an unjust enrichment action in the Code⁶⁷—made it possible to enforce a wide spectrum of "brother-like" obligations. These ranged from the altruistic payment of someone else's obligation of family support, to the more self-interested payment of a secured debt of an insolvent debtor by a creditor attempting to improve his chances of collection.⁶⁸ As perceived by a court decision quoted in Professor Dawson's pathbreaking monograph on unjust enrichment, the governing principle was found in the equitable rule "that no one, not even an incapable person, should enrich himself at the expense of another."⁶⁹

In understanding the operation of such a principle, it is important to keep in mind that the standards against which controversial behavior is measured are those which the court sees as applicable to society as a whole, regardless of class or profession. The principles, therefore, are supposed to pre-exist the parties' contracts or contractual practices and to apply to "a minor," "a married woman," "a possessor of personal property," or "a contracting party" and not to "the landholders," "the merchants" or "the consumers." Thus, diligence, morality, good customs or public order, although in significant measure inspired by the figure of the good father of the family, can be deemed applicable by the court, a priori, to any type of legal relationship. Yet, it would be a serious mistake to assume that the French judges' ability to rely on such a protean standard automatically transforms them into powerful chancellors, willing and able to impose on contracts and transfers of property, a morality higher than the selfish man's.

65. Tunc, *A Codified Law of Tort—The French Experience*, 39 LA. L. REV. 1051, 1059 (1979).

66. *Id.* at 1064-65.

67. J. DAWSON, UNJUST ENRICHMENT 97 (1951).

68. *Id.* at 179 (summary of *Cour de cassation* decisions).

69. *Id.* at 178, citing Judgment of 15 juill. 1873, Cass. civ., D.1873.1.457.

The *Cour de cassation's* preference for contractual justice over equity, even in cases involving contracts of adhesion,⁷⁰ is a good illustration of the limitations that weigh upon the equitable powers of courts, either as a result of valid normative constraints or self-imposed restraints. One may agree with the view, held by the *Cour de cassation* in some decisions, that the court does not have the power to review the terms of contracts, as these are questions of "fact."⁷¹ Or, one may regard this view as merely a cover for the court's unwillingness to make decisions that may be very unpopular with influential sectors, preferring that such decisions be left to the legislature. Whichever view is taken, the end result is the same: judicial inaction.⁷²

In conclusion, it is true that some of the selfish man's propensities for abuse or excess have been curbed by the courts' reliance upon standards inspired in various versions of the morality and diligence of a good father of the family. It is also true that the Code itself rewards the selfish man's brotherly efforts in instances of *negotiorum gestio* and proscribes unjust enrichment when one pays what one does not owe. Yet, on the whole, the selfish man of property remains an undesirable business associate, partner or co-investor. On a day-to-day or professional basis, his method of doing business—as reflected in his contracts and uncurbed abuses of property—requires that he, as a "winner" in the legal relationship, take all the profits he can get, while the other party or parties take as little as he can succeed in letting them have.

THE COMMERCIAL LAW CONTEXT

Formality and Parol Evidence

Although the United States Uniform Commercial Code (U.C.C.) does not regard the sale of real property as a commercial sale,⁷³ the real property law applicable to such sales seldom requires a special formality beyond a simple writing. Printed or standard forms of deeds of sale, warranty deeds of sale, warranty deeds and quitclaim deeds, as well as suitable security devices, can usually be acquired from bookstores or stationery shops, ordinarily being quite uniform in fashion.⁷⁴

70. See Bolgar, *supra* note 52, and authorities cited therein.

71. *Id.*

72. *Id.*

73. U.C.C. §§ 2-102 & 2-105 (1972 version).

74. The standardization of real property transactions is no doubt attributable to the presence of intermediaries such as real estate brokers, banks, and title insurance companies whose own practices also tend to be standardized.

The U.C.C. requires a writing for sales of goods that exceed \$500,⁷⁵ but a merchant can conclude a contract for millions of dollars over the telephone and then send a simple writing merely confirming the oral contract.⁷⁶ If within ten days of the reception of the confirmation an objection is not made, the contract will be valid and enforceable.⁷⁷ In addition, some oral contracts will be enforced, as where the buyer's order requires a special manufacture and the seller has substantially commenced such a process before the seller receives notice of repudiation, where goods have been accepted or paid for, and where the party against whom enforcement is sought admits in court the existence of the contract.⁷⁸

Once the payment stage is reached, commercial law usually requires that certain formalities be met when instruments such as bills of exchange or checks are used. Among the formalities required in these instruments are the place or date of payment; the amount payable; the maker's, drawer's or acceptor's signature; and so on. By comparison with notarial deeds, commercial instruments are usually drawn by the parties themselves and are much less formal. It is also noteworthy that, as a rule, the role of formality in commercial law is *functional* in that it aids the enforceability of the promise by providing the operative setting such as a place for a signature, or datum such as a date of maturity. In this respect, the role of formality in commercial law contrasts with the adherence to "solemnity for solemnity's sake" that permeates many Civil Code transactions.

Hand-in-hand with informality goes a relaxed attitude toward the admissibility of parol evidence. Since commercial intent must be read in light of the course of dealings, usage of trade, and custom, it is not surprising, for example, that the Court of Appeals for the Fourth Circuit held in *Columbia Nitrogen Corp. v. Royster Co.*⁷⁹ that the U.C.C. rejected the old rule which limited the introduction of evidence as to usage of trade or course of dealing only to cases where the contract is ambiguous. Even in a contract where the price was clearly stipulated and which contained a clause clearly stating that the contract contained all express or implied terms, the court admitted parol evidence on usage of trade to contradict the stated price. If the usage of trade was such that a stated price was merely a projection to be adjusted to circumstances, such as the bottom dropping out of the market, evidence of this usage was admissible

75. U.C.C. § 2-201(1) (1972 version).

76. U.C.C. § 2-201(2) (1972 version).

77. U.C.C. § 2-201(2) (1972 version).

78. U.C.C. § 2-201(3)(a) to (c) (1972 version).

79. 451 F.2d 3 (4th Cir. 1971).

and decisive. In the view of the court, the usage of the trade had to be admitted unless expressly negated.⁸⁰

Application to Face-to-Face Transactions and to Immediate Parties

Unlike the French Civil Code, the U.C.C. encourages transactions entered into by parties at a distance.⁸¹ Under the U.C.C. provisions, the court may find an agreement of sale even though the moment of making the new contract is not clear from interchanged correspondence.⁸²

The attitude toward *inter ausentes* transactions exhibited by the U.C.C. should not be surprising since, on the whole, commercial law is an impersonal law, a law of "strangers" who have nothing but their trade in common. In its formative period, from the ninth to the thirteenth centuries, commercial law had to rely on the brotherly ties and the friendship of Mediterranean and North Central European traders, who were for the most part Jewish and Arab merchants.⁸³ As the commercial law developed, reliance shifted from a common religious or family bond to documents, records, and special types of promises, ordinarily expressed in standardized written fashion. In addition, commercial promises were, and continue to be, to a large degree third party promises, such as that of the acceptor in the bill of exchange and the promise of the surety or the insurance company in a policy or bond.

The Cause of Commercial Contracts

If by *cause* one means the terms in the first or underlying bargain and exchange between two or more contracting parties, which prompted subsequent transactions involving other parties, then many commercial promises are "causeless" or, more appropriately, "abstract."⁸⁴ In an abstract promise the promisor is bound to the

80. *Id.* at 7-8.

81. *See, e.g.*, U.C.C. § 2-204(2), comment (1972 version).

82. *See, e.g.*, U.C.C. § 2-204(2), comment (1972 version).

83. *See generally* L. GOLDSCHMIDT, *supra* note 1, at 79-352 (description of medieval trade); P. HUVELIN, *ESSAI HISTORIQUE SUR LE DROIT DES MARCHES ET DES FOIRES* 38-52 (1897) (description of some of the leading medieval fairs); S. GOITEIN, *A MEDITERRANEAN SOCIETY—THE JEWISH COMMUNITIES OF THE ARAB WORLD* (1967) (role of Jewish and Arab traders); Goitein, *Formal Friendship in the Medieval Near East*, 15 *PROCEEDINGS OF THE AMERICAN PHILOSOPHICAL SOCIETY* 484 (December 1971) (insightful account of the meaning of "brotherhood," especially in instilling trust among Jewish and Arab merchants).

84. For a description of the operation of a typically abstract promise in letter of credit law, *see* B. KOZOLCHYK, *COMMERCIAL LETTERS OF CREDIT IN THE AMERICAS* 454-82 (1966). Clearly, the concept of abstraction is one intended to promote the circulation of goods (including paper). Thus, it finds its inspiration in the law of property.

third party promisee regardless of the underlying cause. Take, for example, the case of a bank in Baton Rouge that confirms a letter of credit issued by a bank in Mexico City to pay for the shipment of Louisiana crawfish to Mexico. What is the cause of the Louisiana bank's promise to the Louisiana exporter of crawfish or beneficiary of the letter of credit? Certainly it is not the Mexican importer's contract with the Louisiana exporter, as banks readily disclaim any involvement in such a contract and remind their lawyers that "banks deal in documents and not in goods."⁸⁵ It is not the Mexican importer's opening-of-credit agreement with his bank in Mexico wherein he may promise, *inter alia*, to prepay the credit or to reimburse the bank, because the United States bank is not a party to such a contract. Similarly, the cause cannot be found in the relationship between the Mexican and the Louisiana banks, to which the Louisiana exporter is not a party. Finally, the cause cannot be found in the relationship between the Louisiana exporter and the confirming bank, because the exporter is under no contractual obligation to the Louisiana bank; he may, in fact, disregard the existence of the credit with impunity where the Louisiana bank is concerned. Despite the absence of a contractual cause in the civil code sense, the Louisiana beneficiary can enforce payment of the bank's promise merely on the strength of that promise. Once the Louisiana bank accepts a draft drawn by the beneficiary and such a draft is negotiated to a bank in New York, London, or Frankfurt, even if the underlying transaction was the rental of a house of ill repute, the Louisiana bank would, in most jurisdictions, have to pay on its acceptance.⁸⁶

Surely the confirming bank has a reason or cause to be bound in its confirmation of the credit, but this reason is not found in the original underlying transaction. Rather, it is found in the significant economic value flowing to the bank as a result of the reliance by third parties "or strangers" on the bank's promises. Herein lies the main difference between the civil and the commercial notion of cause. *Cause* for purposes of the U.C.C. is nothing more than what a regular participant in the given market transaction would deem of value when issuing his promise. Since an *animus donandi* is foreign to commercial transactions, the promisor's intent is presumed to be one of "value received" for his promise. This value need not be immediately forthcoming; it could be a future value or even a mere

85. INTERNATIONAL CHAMBER OF COMMERCE, UNIFORM CUSTOMS AND PRACTICES FOR DOCUMENTARY CREDITS art. 8(a) (Pub. 290, 1975). "In documentary credit operations all parties concerned deal in documents and not in goods." *Id.*

86. See U.C.C. § 3-305(b), comment 6 (1972 version). See also B. KOZOLCHYK, *supra* note 84, at 471-75, 534-40.

potential for value, as is the case, for example, with the U.C.C.'s firm offer.⁸⁷ To a layman, value may even be imperceptible; however, courts must ascertain it not by looking at what the contract says is of value, but by looking at what the market, or what most regular participants in the transaction, deem of value.⁸⁸

This market determination, ironically enough, has resurrected the Albert Magnus-Aquinas medieval notion of a just price and installed it in a key position in the adjudication of commercial disputes.⁸⁹ Resort to the market by way of establishing a course of dealing or usage of trade, or that which is "reasonable," is well nigh inevitable when the contract is vague, ambiguous or silent with respect to key terms.⁹⁰

In addition, however, a market-inspired just price determination is also common in U.C.C. adjudication when one of the parties has unconscionably taken advantage of the other party's contractual weakness or incompetence.⁹¹ Thus, section 2-302 of the U.C.C. on unconscionability has been used to rescind mixed sales (*i.e.*, sales which are commercial for the seller, but civil for the buyer) where the weak consumer paid a purchase price of two and one-half times the market value of the items purchased, or where the security provided by the buyer in the form of a cross collateral clause was deemed excessive.⁹² Finally, and most surprisingly for nineteenth century commercial codes such as that of Mexico,⁹³ certain U.C.C. provisions have been relied upon by courts to justify this application of the "objective" lesion doctrine in some disputes between experienced merchants, thereby implicitly using just price as the equitable doctrine advocated by Pothier.⁹⁴ It will be recalled, for example, that

87. U.C.C. § 2-205 (1972 version).

88. See Kozolchik, *supra* note 61, at 232.

89. See note 41, *supra*, and accompanying text.

90. See, *e.g.*, U.C.C. §§ 2-204(3) & 2-206(1)(a)(2) (1972 version).

91. See, *e.g.*, *Toker v. Perl*, 103 N.J. Super. 500, 504, 247 A.2d 701, 703 (1968). The New Jersey trial court held that a contract for the sale of a freezer priced at more than two and one-half times its market value was unenforceable due to fraud in its inception and inherent unconscionability. *Id.* at 504, 247 A.2d at 703. See also *Kugler v. Romain*, 58 N.J. 522, 279 A.2d 640 (1971); *Toker v. Westerman*, 113 N.J. Super. 452, 274 A.2d 78 (1970); *Central Budget Corp. v. Sanchez*, 279 N.Y.S.2d 391, 392 (1967).

92. See *Williams v. Walker Thomas Furniture Co.*, 350 F.2d 445 (D.C. Cir. 1965); *Toker v. Perl*, 103 N.J. Super. 500, 247 A.2d 701 (1968).

93. CODIGO DE COMERCIO art. 385 (Mex.) states: "Commercial sales shall not be rescinded for lesion; the aggrieved party, however, may attach to the appropriate criminal action an action for damages against the contracting party that has acted with fraud or malice in the formation or performance of the contract . . ." (Writer's trans.) For a comment on the effect of this provision on installment or consumer sales, see Warren, *Mexican Retail Installment Sales Law: A Comparative Study*, 10 U.C.L.A. L. REV. 15, 53-57 (1962). See also Kozolchik, *supra* note 61, at 228.

94. See text at note 33, *supra*.

the Fourth Circuit Court of Appeals admitted parol evidence in the *Columbia Nitrogen* decision to prove that, despite a clearly written price stipulation (including an escalator clause), usage of trade regarded such a stipulation as a mere projection, to be disregarded when the price of phosphate fell precipitously.⁹⁵ It should also be noted that the *Columbia Nitrogen's* reliance on just price is not dictated by the U.C.C. rules on warranties. It is true that official comment four to section 2-313 states: "But in determining what they [the parties] have agreed upon, good faith is a factor and consideration should be given to the fact that the probability is small that a real price is intended to be exchanged for a pseudo obligation."⁹⁶ Yet, official comment four to section 2-615 warns:

Increased cost alone does not excuse performance unless the rise in the cost is due to some unforeseen contingency which alters the essential nature of the performance. Neither is a rise or collapse in the market itself a justification, for that is exactly the type of business risk which business contracts made at fixed prices are intended to cover.⁹⁷

Significantly, the *Columbia Nitrogen* decision does not rest on the doctrine of unforeseeability of risk or *rebus sic stantibus*, but on its opposite. Merchants in the phosphate trade deal with precipitous declines in market prices by adjusting their contract prices accordingly; and such an adjustment rule is deemed to have been adopted by the parties, unless they expressly and categorically rejected it.⁹⁸

As a commercial lawyer, I am happier with the *Columbia Nitrogen* perception of lesion and just price than with that espoused by comment four to section 2-615, which is almost identical to the view expressed by Dean Ripert across the Atlantic.⁹⁹ I have serious difficulties with the assertion that a rise or a collapse of a market price is "exactly the type of business risk which fixed price contracts are intended to cover." Why not assume that business risks vary with the nature of the business? Should one consider the producer of fertilizers in the *Columbia Nitrogen* decision as much of a speculator as

95. See note 79, *supra*, and accompanying text.

96. See U.C.C. § 2-313, comment 4 (1972 version).

97. See U.C.C. § 2-615, comment 4 (1972 version).

98. See note 80, *supra*, and accompanying text.

99. Dean Ripert states:

In times of crisis, where the volatility of values and prices is particularly intense, such transformations are constant. A seller who has not suffered lesion the day of the execution of the contract may suffer it if the money in which he has been paid loses all its value three months thereafter, and conversely, despite the appearance of the contract, it may be an excellent deal for the other contracting party Such speculation is the very soul of commerce; if one allows rescission, one destroys it.

G. RIPERT, *supra* note 25, at n° 71 (writer's trans.).

a buyer of stock options or warrants, a "short" seller of shares of stock, or a "futures" buyer of commodity contracts? Are there not markets where price volatility is more of an assumed fact of life than in others? If the fourth circuit is correct in its perception of the commercial facts in the phosphate trade, it is a market where participants are not expected to assume the risks of high price volatility. Thus, the exclusion of sharp price fluctuations as a basis for lesion, while justified in many instances by the market standard, could well be unjustified in others.

Concern for Third Party Rights

Unlike the French Civil Code, the U.C.C. is quite concerned about the rights of third parties, or of parties other than those in the original or underlying transaction. Third parties protected under U.C.C. provisions include: the bona fide purchaser of goods sold by one merchant to another; the holder in due course of negotiable instruments; the beneficiary of a letter of credit and the holder in due course of his accepted draft; the holder of a negotiable document of title; the bulk sale purchaser or buyer of a commercial establishment; the purchaser of investment securities; and the secured creditor who, when advancing value, relies on the notice provided by possession of the chattel or by the recording of his security interest.

A third party earns the U.C.C.'s protection by giving value in terms that the market for each particular transaction accepts as sufficient. Additionally, he must act in good faith. Good faith is reflected in some measure by the third party's willingness to part with value and is ascertained by asking if the giving of value, as well as the specifically disputed behavior, is reasonable or in accordance with standards adhered to by most participants in the same transactions.¹⁰⁰ Where the U.C.C. wishes to encourage the giving of value to the utmost, it lowers the standard of diligence implicit in

100. This version of what constitutes good faith is at odds with the negative or "semantic excluder" version advanced by Professor Summers. The "semantic excluder" version holds that it is easier to define good faith by describing what is not bad faith. Summers, "Good Faith" in *General Contract Law and the Sales Provisions of the Uniform Commercial Code*, 54 VA. L. REV. 195 (1968). Unlike the "semantic excluder" version, this version emphasizes the positive in the description (i.e., what good faith is), as a discrete and knowable concept in U.C.C. provisions and in decisional law, asserting that good faith is definable by resort to a market standard of fairness. This market standard may find it convenient in some instances, such as in U.C.C. article three transactions, to lower the required level of diligence, alertness or skill from a bona fide purchaser, see U.C.C. §§ 3-302 & 1-201 (1972 version); but generally, it requires "observance of reasonable commercial standards of fair dealing in trade." U.C.C. § 2-103 (1972 version). For a discussion of the market standard in contemporary commercial law adjudication, see Kozolchik, *supra* note 61, at 258-64.

the good faith requirement. In such instances, the third party is only supposed to be "honest in fact," which means that he could be "empty of head" where other merchants are concerned, as long as he is "good of heart."¹⁰¹ Alternatively, where the U.C.C. wishes to encourage a "stop, look and listen" attitude, it requires from the third party the diligence reasonable in that trade.¹⁰²

The Fairness of "Customary" Justice

Jeremy Bentham was not only an articulate and ardent advocate of codification and critic of decisional law, but paradoxically he also provided one of the classic arguments in favor of the fairness of customary law. While objecting to the Aristotelian view of usury, which is based upon the "barrenness of money" and the lack of justification of a monetary charge for the use of such a "fruitless" commodity, Bentham said: "[A]ntecedently to custom growing from convention there can be no such thing as usury; for what rate of interest is there that can naturally be more proper than another?"¹⁰³ It is submitted that what Bentham said of one aspect of a commercial transaction, the fair price of money lent, is generalizable as the most common standard of fairness in the adjudication of commercial disputes in developed trading centers. In these centers, the prevailing legislative and judicial standard is determined by what most regular participants in the transaction in question do when dealing with each other.¹⁰⁴ Thus, paraphrasing Bentham, where the market standard prevails, antecedent to custom, growing from convention, there can be no such thing as commercial law unfairness.

Note that in contrast with the civil code's "contractual justice" standard, the standard in customary law is not necessarily contractual; it may or may not be contractual depending on the degree to which contract approximates custom. To begin with, commercial contracts are not regarded in developed trading centers as having been

101. Summers, *supra* note 100, at 211.

102. *Id.* Although diligence is a component of the good faith concept as defined by a market standard of fairness, it should not be assumed that it applies to every aspect of commercial activity, even within the context of the same transaction. For example, as a bona fide purchaser of a check, a merchant is likely to be held to a lower level of diligence and alertness than in selling or exchanging the goods which prompted his acquisition of the check.

103. 3 J. BENTHAM, *Defence of Usury, Letter IX, THE WORKS OF JEREMY BENTHAM* (1787). Bentham also stated, in the same connection: "[B]ut if usury is good for merchants, I do not very well see what should make it bad for everybody else What I want to know is what there is in the class of men embarked in trade, that would render beneficial to them, a liberty which could be ruinous to everybody else." *Id.* at 13-14.

104. For a discussion of this standard of fairness, also referred to as the market standard in contemporary commercial law adjudication, see Kozolchyk, *supra* note 61, at 258-65.

written in tablets of stone. Parmenides would have had a very hard time with the U.C.C., for he would have insisted on the notion that in each contractual relationship there is only one contract, the "true" contract. The U.C.C., however, treats the sales agreement as if it were Heraclites' river, in a state of constant flux leading to many possible true contracts depending upon the stage of the contractual relationship in issue before the court. If the problem concerns the formation of the contract, then the contract could be said to be the firm offer (with or without consideration), the oral conversation followed by a written confirmation (accepted or unaccepted by the recipient thereof), or the substantial commencement of the manufacture of certain goods.¹⁰⁵ If the problem is related to the adequacy or sufficiency of performance by either party, the contract may be said to be embodied in the parties' course of dealing or the prevailing usage of trade or custom.¹⁰⁶ Finally, if the issue is one of adequate measure of damages for a contractual breach, the U.C.C. has inspired courts to look at hypothetical agreements which would compensate the aggrieved party even for its lost volume or future sales, an item as to which the parties never truly bargained.¹⁰⁷ Bentham's description of customary law justice requires that fairness be ascertained not from one isolated transaction, but from what is done by regular participants on a regular basis. Consequently, we turn our attention to the behavior of a model regular participant in commercial transactions in a developed trading center.

105. U.C.C. § 2-201(3)(a) to (b) (1972 version).

106. U.C.C. §§ 2-207(3) & 2-208(1) (1972 version).

107. See, e.g., *Neri v. Retail Marine Corp.*, 30 N.Y.2d 393, 334 N.Y.S.2d 165, 285 N.E.2d 311 (1972), where the court states:

The conclusion is clear from the record—indeed with mathematical certainty—that "the measure of damages provided in subsection (1) is inadequate to put the seller in as good a position as performance would have done" (Uniform Commercial Code, § 2-708, subsection [2]) and hence—again under subsection (2)—that the seller is entitled to its "profit (including reasonable overhead) . . . together with any incidental damages . . . , due allowance for costs reasonably incurred and due credit for payments or proceeds of resale."

It is evident, first, that this retail seller is entitled to its profit and, second, that the last sentence of subsection (2), as hereinbefore quoted, referring to "due credit for payments or proceeds of resale" is inapplicable to this retail sales contract. Closely parallel to the factual situation now before us is that hypothesized by Dean Hawklund as illustrative of the operation of the rules: "Thus, if a private party agrees to sell his automobile to a buyer for \$2,000, a breach by the buyer would cause the seller no loss (except incidental damages, i.e., expense of a new sale) if the seller was able to sell the automobile to another buyer for \$2000. But the situation is different with dealers having an unlimited supply of standard-priced goods. Thus, if an automobile dealer agrees to sell a car to a buyer at the standard price of \$2,000, a breach by the buyer injures the dealer, even though he is able to sell the automobile to another for \$2,000. If the dealer has an inexhaustible supply of cars, the resale to replace the breaching buyer costs the dealer a

An Archetype of Commercial Law: the Decent and Reasonable Merchant

Levin Goldschmidt, the great nineteenth century historian of commercial law, had this to say about the archetypal merchant:

We have stressed the importance of the influence exercised by economic views and conditions and by ethical considerations (*Treu and Gleuben, bona fides*) in the formation of commercial law. The ethical-legal genius of classical antiquity, and especially of the Romans, created a model valid for all time, the honest businessman (*bonus vir*), equally distant from brutal egotism and from ultraterrestrial renunciation.¹⁰⁸

Karl Llewellyn seems to have been influenced by Goldschmidt when he confided to Tennessee lawyers:

The way to write good law is to indicate what you want to do, and you assume within reason, that the persons the law deals with will try to be decent; then after that, you lay down the edges to take care of the dirty guys and try to hold them in I am willing to admit a certain amount of bad faith and stupidity on the part of anybody today, but I am reasonable, and I don't think general standards ought to be drawn with the assumption that there is going to be unreasonableness.¹⁰⁹

How does the U.C.C. expect this decent and reasonable merchant to behave when acting as a regular participant in commercial transactions? First of all, the Code regards the reciprocal pursuit of profit as decent and reasonable. In the case of sales, good faith means "honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade." As indicated earlier, the notion of a just price predicated upon the market standard is at the root of what the Code deems as fair.¹¹⁰ In contrast with nineteenth century European and Latin American civil and commercial codes, the U.C.C. is willing to enforce a sales agreement that omits the price, or the time and place for payment or for delivery of the goods. The U.C.C. directs the trier of fact to find a "reasonable

sale, because, had the breaching buyer performed the dealer would have made two sales instead of one. The buyer's breach, in such a case, depletes the dealer's sales to the extent of one, and the measure of damages should be the dealer's profit on one sale. Section 2-708 recognizes this, and it rejects the rule developed under the Uniform Sales Act by many courts that the profit cannot be recovered in this case." (Hawkland, *Sales and Bulk Sales*, pp. 153-54; and see Comment, 31 *FORDHAM L. REV.* 749, 755-756.)

Id. at 399-400, 334 N.Y.S.2d at 169-70, 285 N.E.2d at 314.

108. L. GOLDSCHMIDT, *supra* note 1, at 35.

109. Llewellyn, *Why a Commercial Code?*, 22 *TENN. L. REV.* 779, 782 (1953).

110. See text at notes 89-99, *supra*.

price" by relying on market prices and valuations that are current in the vicinity of the transaction.¹¹¹

The underlying theory of compensation for breach of contract is to place the aggrieved party in as "good a position as performance would have done."¹¹² Where a given measure of damages does not place the aggrieved party in such a position, the U.C.C. requires the court to determine the profit that the aggrieved party would have made had there been full performance by the party in breach. Thus, if the aggrieved party is a seller, the court is required to take into account items such as "reasonable" overhead in determining the profitability, or the difference between cost and contract price.¹¹³

The justification for the above notions of decency and reasonableness can again be found in Bentham:

If there be an exchange, there are two alienations, each of which has separate advantages. This advantage for each of the contracting parties is the difference between the value they put upon what they give up, and the value of what they acquire. In each transaction of this kind, there are two new masses of enjoyment. In this consists the advantage of commerce.¹¹⁴

The late and lamented Lon Fuller quoted from a famous theorist of business organization to clarify the implications of reciprocal advantage:

[T]he rule must be that you give, so far as possible, what is less valuable to you but more valuable to the receiver, and you receive what is more valuable to you and less valuable to the giver. This is common sense, good business sense, good social sense, good technology, and is the enduring basis of amicable and constructive relations of any kind.¹¹⁵

Courts applying the U.C.C. have, by and large, adopted the same view of decency and reasonableness. As stated by Judge Friendly while elucidating the meaning of the term "chicken" in the famous case of *Frigalimint Importing Co., Ltd. v. B.N.S. International Sales Corp.*,¹¹⁶ "[p]laintiff must have expected defendant to make some pro-

111. U.C.C. § 2-201, comment 1 (1972 version).

112. U.C.C. § 2-708 (1972 version). See also *Neri v. Retail Marine Corp.*, 30 N.Y.2d 393, 399-400, 334 N.Y.S.2d 165, 170, 285 N.E.2d 311, 314 (1972).

113. See *Neri v. Retail Marine Corp.*, 30 N.Y.2d 393, 334 N.Y.S.2d 165, 285 N.E.2d 311 (1972).

114. 1 J. BENTHAM, WORKS 331 (1859), cited in L. FULLER & M. EISENBERG, BASIC CONTRACT LAW 100 (3d ed. 1972).

115. L. FULLER & M. EISENBERG, *supra* note 114, at 100.

116. *Frigalimint Importing Co., Ltd. v. B.N.S. Int'l Sales Corp.*, 190 F. Supp. 116 (S.D.N.Y. 1960).

fit—certainly it could not have expected defendant deliberately to incur a loss.”¹¹⁷ Thus, the decency of the decent and reasonable merchant in the U.C.C. requires what a California appellate court described as “an implied covenant of good faith and fair dealing that neither party will do anything which injures the right of the other to receive the benefits of the agreement.”¹¹⁸ Clearly such a covenant presupposes a minimum of cooperation between the parties in the seemingly antagonistic pursuit of reciprocal gain.

A significant element of this cooperation is the reliance on a merchant's word. The U.C.C.'s decent and reasonable merchant must expect and reward reliance on his representations or warranties, especially by other merchants.¹¹⁹ In addition, he is expected to act honestly or truthfully when entrusted with extra-judicial remedies such as the resale or repurchase of goods in a sale agreement breached by the other party,¹²⁰ or with the payment of his seller's creditors in a bulk purchase of a commercial establishment,¹²¹ or with the foreclosure sale of the collateral in a secured transaction.¹²² He is also trusted to testify truthfully in his own lawsuit as to contractual intent, course of dealing, and usage of trade.¹²³

Finally, the U.C.C. assumes that a decent and reasonable merchant possesses a modicum of professional skill and diligence. Thus, the U.C.C. defines a merchant as a person

who deals in goods of the kind or otherwise by his occupation holds himself out as having knowledge or skill peculiar to the practices or goods involved in the transaction or to whom such knowledge or skill may be attributed by his employment of an agent or broker or other intermediary who by his occupation holds himself out as having such knowledge or skill.¹²⁴

Because of this assumption, the U.C.C. does not consider it indecent

117. *Id.* at 120.

118. *Steinmeyer v. Warner Consolidated Corp.*, 42 Cal. App. 3d 515, 519, 116 Cal. Rptr. 57, 60 (1974) (citations omitted).

119. U.C.C. § 2-314, comment 2 (1972 version) states:

The question when the [implied warranty of merchantability] is imposed turns basically on the meaning of the terms of the agreement as recognized in the trade. Goods delivered under an agreement made by a merchant in a given line of trade must be of a quality comparable to that generally acceptable in that line of trade under the description or other designation of the goods used in the agreement.

120. *See, e.g.*, U.C.C. § 2-706(1) (1972 version) which requires that the seller's resale be “in good faith and in a commercially reasonable manner.” For a similar requirement on the buyer's cover, *see* U.C.C. § 2-712(1) (1972 version).

121. *See, e.g.*, U.C.C. §§ 6-106 & 6-109(2) (optional sections) (1972 version).

122. *See, e.g.*, U.C.C. § 9-504(3) to (4) (1972 version).

123. U.C.C. § 2-202, comment 2 (1972 version).

124. U.C.C. § 2-104(1) (1972 version).

or unreasonable, for example, to bind a merchant to the terms of a "confirmation," unanswered or unobjected to within ten days after it is received.¹²⁵ The U.C.C. also finds it decent and reasonable to provide priority to a secured creditor who files his financing statement first, rather than to a creditor who made an earlier advance, even though the first to file knew or could have known of the competing creditor's security interest when making his later advance.¹²⁶ In other words, the decent and reasonable merchant is assumed to be diligent in his replies of commercial correspondence and in his recording of security interests.

Lest one conclude from the preceding description that the decent and reasonable merchant is a paragon of virtue, it is now appropriate to examine the nature and scope of the principles that govern commercial adjudication.

General Principles and Commercial Law Adjudication

The general principles that govern commercial law adjudication are much more reduced in scope of application than those that govern civil law adjudication. Despite the perennial attempts at "objectivizing" commercial law, understandable as these attempts are, by the ever growing number of nonregular market participants, commercial law is quintessentially the law of merchants. Bankers, insurers, wholesalers and retailers, carriers, warehousemen, and brokers make their *own* law by the mere fact that they perform a business function that other participants in the market transaction find essential.

The general principles that emerge from such law making are by necessity bounded by the nature of the business and by the factual context of each type of transaction. An attempt to fashion or apply principles as general as those of the French Civil Code (*i.e.*, applicable to "persons" without distinction of class or profession, or to "goods" without distinction of the transactional context) is bound to create intolerable inconsistency and confusion. Take, for example, the principle that "in matters of movable property possession is the

125. U.C.C. § 2-201(2), comment 3 (1972 version) states:

Between merchants, failure to answer a written confirmation of a contract within ten days of receipt is tantamount to a writing under subsection (2) and is sufficient against both parties under subsection (1). The only effect, however, is to take away from the party who fails to answer the defense of the Statute of Frauds.

It is submitted that, procedurally speaking, once a defendant raises the defense of a statute of fraud as his sole or main defense, the effects of depriving him of that defense are more significant than the comment would lead one to believe.

126. See, *e.g.*, U.C.C. § 9-312, comment 4, example 1 (1972 version).

equivalent of title."¹²⁷ Conceivably, this principle could equally warrant a bank's claim to the possession of the goods based on its possession of a letter of hypothecation, a "purchase money" creditor's claim to the goods based on the possession of a bill of lading, or a carrier's claim based on his possession of the goods, and so on. In order to resolve such disputes, it becomes necessary to inquire what kind of creditor is the possessor. This is legal shorthand for questions such as the following: what kind of financing does he do; how does he accomplish his financing; and how does his financing contribute to the liquidity of the debtor's assets and with it, to marketability of the goods in question?¹²⁸

In the final analysis, what constitutes a general principle in commercial law adjudication is nothing more than a business practice accepted as valid by most regular practitioners of the trade. Thus, for example, the principle which holds that "banks deal in documents and not in goods"¹²⁹ can only be understood and applied in the context of bank documentary credit transactions. Even though this particular principle represents a consensus of what should be the degree of a bank's involvement in a transaction underlying the issuance of a letter of credit, it certainly would be inapplicable to a bank's attempt to sell privately the collateral in a defaulted secured transaction. Where business practices intersect and conflict, their respective general principles will also conflict. Such is the case, for example, where carriers conduct their business of carrying goods in a manner that bankers find inconsistent with their business of extending credit on the strength of documents of titles issued by car-

127. C. CIV. art. 2279 (writer's trans.).

128. Typical of the analysis alluded to in the text is the following:

[T]o what extent is the lienor harmed by being subordinated to legitimate future advances (obligatory or voluntary) made under an existing loan agreement? We have hypothesized successive loans on April 1 and May 1 with a lien attaching on April 15. If the lienor has the machinery sold, he will succeed in reaching the debtor's equity in the machinery (its value less the April 1 loan, if we have no other interests to worry about). If he delays the sale until after May 1, he will still reach the debtor's equity, but that will now have been diminished by the May 1 loan. However, the debtor's assets have not been depleted: the May 1 advance balances the diminution of his equity in the machinery. The lienor will now receive less from the sale of the machinery than he would have received before May 1, but his chance of collecting his claim from the debtor's remaining assets (which now include the May 1 advance) is as good as ever; presumably it is better than ever since the debtor now has a new supply of working capital. Our lienor is a judgment lienor and thus by hypothesis a creditor who was originally unsecured. He does not seem to be unduly prejudiced by subordination to the subsequent advance if he chooses to wait before having the property sold or throwing the debtor into bankruptcy.

2 G. GILMORE, SECURITY INTERESTS IN PERSONAL PROPERTY 939 (1965).

129. See INTERNATIONAL CHAMBER OF COMMERCE, *supra* note 85.

riers. *Mutatis mutandis*, since the U.C.C. definition of "merchants" clearly excludes consumers and since consumers are not represented in commercial law making, the protection that consumers can expect from the general principles of commercial law adjudication is at best marginal. This is particularly true where the practice supporting the general principle is widespread among merchants.

Consider the situation where a consumer reads and signs a form contract and a promissory note common in the trade in question, only to discover that he has received much less than represented and assumed a far greater liability than he intended. Suppose that the note finds its way to a bank which has given value on it to its holder. Could the defendant consumer claim that he was "tricked" into buying the product and signing the note and attack the status of the holder in due course by alleging a general principle such as "fraud corrupts everything"? The traditional commercial answer has been negative. From a strictly commercial law standpoint, the court would deem relevant the fact that the contracting party could understand what he read, as well as the fact that the salesman was demonstrating this product "with a view to an ultimate sale of it and was utilizing a familiar technique of the commercial world."¹³⁰

This is why the U.C.C.'s proscription of unconscionability in article two,¹³¹ the United States Supreme Court's curtailment of prejudgment remedies in secured transactions law,¹³² and the Federal Trade Commission's exclusion of paper generated by consumer transactions from the category of negotiable or "holder in due course" paper¹³³ are not, in the technical sense, commercial law principles.

130. See *Reading Trust Co. v. Hutchison*, 35 D. & C.2d 790 (Pa. C.P. 1964).

131. U.C.C. § 2-302 (1972 version).

132. See *Fuentes v. Shevin*, 407 U.S. 67 (1972); *Sniadach v. Family Finance Corp.*, 395 U.S. 337 (1969).

133. See 16 C.F.R. § 433 (1975). 16 C.F.R. § 433.2 (1975) provides:

In connection with any sale or lease of goods or services to consumers, in or affecting commerce as "commerce" is defined in the Federal Trade Commission Act, it is an unfair or deceptive act or practice within the meaning of Section 5 of that Act for a seller, directly or indirectly, to:

(a) Take or receive a consumer credit contract which fails to contain the following provision in at least ten point, bold face, type:

NOTICE

ANY HOLDER OF THIS CONSUMER CREDIT CONTRACT IS SUBJECT TO ALL CLAIMS AND DEFENSES WHICH THE DEBTOR COULD ASSERT AGAINST THE SELLER OF GOODS OR SERVICES OBTAINED PURSUANT HERETO OR WITH THE PROCEEDS HEREOF. RECOVERY HEREUNDER BY THE DEBTOR SHALL NOT EXCEED AMOUNTS PAID BY THE DEBTOR HEREUNDER.

or, (b) Accept, as full or partial payment for such sale or lease, the proceeds of any purchase money loan (as purchase money loan is defined herein), unless any consumer credit contract made in connection with such purchase money loan contains the following provision in at least ten point, bold face, type:

On the other hand, a court decision that denies a warranty of merchantability in the sale of cancer-inducing cigarettes because "[t]hey are exactly like all others of the particular brand and virtually the same as all other brands on the market,"¹³⁴ applies a commercial law principle in an orthodox fashion;¹³⁵ the standard of merchantability is dictated *by the merchants' and not by the consumers' use* of the product. In sum, while the decent and reasonable merchant is more cooperative and trustworthy than the selfish man of property, he is far from being as brotherly or altruistic as is the good father of the family in family law matters.

THE COMMERCIALIZATION OF CIVIL LAW

The commercialization of civil law is readily apparent by examining the fate of institutions considered essentially civil by some of the most influential draftsmen of the French Civil Code. Portalis is credited with the statement that movable property is within the province of commerce, while immovable property is *particularly* within the domain of civil law.¹³⁶ Yet, at the present time there are very few "objective" commercial codes which do not list transactions undertaken with a profit motive and involving immovable property as commercial acts. In fact, the increasing marketability of property, whatever its type, origin or purpose, is apparent in the following developments:

1) A gradual erosion is evident in the traditional civil law principle that a debtor is responsible for his debts with all his property; the tendency of modern law is toward specificity of *in rem* or *ad rem* liability.¹³⁷

2) Secured transactions are increasingly independent in nature; for example, the real estate lien may be seen as independent from

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See also Guidelines on Trade Regulation Rule Concerning Preservation of Consumers' Claims and Defenses, 41 Fed. Reg. 20,022 (1976).

134. *Green v. American Tobacco Co.*, 391 F.2d 110 (5th Cir. 1968) (Simpson, J., dissenting), *adopted*, 409 F.2d 1166 (5th Cir. 1969).

135. See U.C.C. § 2-314, comment 2 (1972 version). This comment is quoted at note 119, *supra*.

136. See generally Ducharme, *Les Opérations Immobilières et le Droit Commercial*, 81 LA REVUE DU NOTARIAT 5 (1978) (Can.).

137. C. CIV. art. 2093 states that "the property of the debtor is the common pledge of his creditors, and the proceeds thereof are distributed among them pro-rata, unless legitimate causes of preference exist between the creditors." (Writer's trans.) See Kozolchyk, *supra* note 42, at 333 (discussing the principle of specification in modern

the underlying transaction. Thus, the German *Grundschuld* (or territorial debt) is not an accessory obligation to the principal loan. The marketability of this lien in the form of bonds or indentures requires that it be created regardless of whether an advance was made prior to the perfection of the security interest.¹³⁸

3) In rem rights, such as the usufruct, are now monetized.¹³⁹ In addition, certain traditional civil transactions, such as some long term leases, have become subject to commercial law regulation as bulk sales in cases where the long term lease involves a commercial establishment (*fond de commerce*).¹⁴⁰ In significant measure this treatment results from a policy of providing greater protection to third party creditors. For a similar third party protection reason, the trend in real property law is not toward "causal" but toward abstract adjudication. In other words, the future of real property law does not belong to the pre-1855 French system of contractual supremacy, with its sequel of secret or unrecorded liens, but to the German *Grundbuch* system¹⁴¹—a system designed to protect those who acquire property or advance monies on the strength of a recording or a legally sanctioned appearance of a right in rem.

A 1939 French *Cour de cassation*¹⁴² decision particularly illustrative of the trend involved a father who had simulated a sale of real property to one of his children; the child in turn mortgaged the property to a third party. Another heir claimed the nullity of the mortgage and alleged simulation, presenting some counter letters purportedly embodying the true intent. The Court preferred the mortgagee over the heir "because of the error that the force of the appearances created with the lender when he decided to give value on the strength of ostensible title."¹⁴³

land registry law and referring to the disappearance in Mexico of the practice common until the late eighteenth century of creating mortgages on all the property of the debtor, including after acquired property). For the imaginative use of the principle of specificity in the contemporary law of secured transactions, see U.C.C. §§ 9-105, 9-106, 9-109 & 9-204 (1972 version) (classification and definition of personal property).

138. See BÜRGERLICHES GESETZBUCH arts. 1191-98 (Ger.). These articles are discussed in 2 L. ENNECCERUS, T. KIPP & W. WOLFF, *TRATADO DE DERECHO CIVIL* 189-92 (8th ed. 1948).

139. See, e.g., LA. CIV. CODE art. 568, added by 1976 La. Acts, No. 103. See also *Report by the Committee for the Revision of Book II of the Louisiana Civil Code of 1870, reprinted in SPECIAL PAMPHLET—CIVIL CODE BOOK II* 49-72 (West, 1978).

140. Décret n° 53-960 du 30 sept. 1953, in *CODE DE COMMERCE* 475-86 (Dalloz 1976).

141. See Kozolchyk, *supra* note 42, at 314-16.

142. Judgment of 25 avril 1939, Cass. civ., D.P. 1940.1.12. This decision is discussed in A. WEILL ET F. TERRE, *supra* note 17, at 307-10. See also Judgment of 13 déc. 1962, Cass. ass. plen., D.1963.1.277, discussed *supra* note 53, which applies the same principle of protection of ostensible authority or rights.

143. A. WEILL ET F. TERRE, *supra* note 17, at 308 (writer's trans.).

The civil code agency has likewise become an increasingly abstract transaction, often as not protecting those who deal with the agent who appears to have the power to bind his principal, against a principal's claim of the agent's abuse of the power of representation.¹⁴⁴ Notarial deeds are frequently boiler plate; formalities are fewer and less sacramental or awe-inspiring in nature; and the fool-proof value of an "authentic act" in Louisiana, among other civil code jurisdictions, has given way to the corrections of a contractual or notarial error.¹⁴⁵

THE CIVILIZATION OF COMMERCIAL LAW

Equity and Predictability

While the commercialization of civil law is a widely known and easily understood phenomenon, the "civilization" of commercial law is not. It is submitted that the main reason for the lack of understanding is the longing for maximum certainty or predictability of legal results that has always prevailed among commercial lawyers, including some of the very best ones.¹⁴⁶ It is widely assumed today, as it was assumed by the followers of Bentham, Locke, Turgot, and the Physiocrats during eighteenth century pre-codification France, that commerce would suffer as a result of rules as "civil" in nature as *laesio*. I am reminded of the apocryphal barrister who urged the hesitant commercial law judge to decide the case and give him a rule, good or bad; for with a rule, any rule, he could live, whereas with uncertainty he could not. I am also reminded of an essay by Shaw labelled *Killing for Sport*, in which the author warned the reader not to be deceived by the nature-loving appearance of a holy man as he walked carefully down a cool, grassy path, his eyes riveted on the ground lest he step on the smallest living creature. Wait, said Shaw, until the same holy man goes into his hot and humid cave, tries to nap, and a mosquito or nasty fly lands on his

144. See note 53, *supra*.

145. See, e.g., *Wilson v. Levy*, 234 La. 719, 101 So. 2d 214 (1958).

146. See, e.g., Lord Mansfield's statement in *Vallejo v. Wheeler*, 99 Eng. Rep. 1012 (1774): "In all mercantile transactions, the great object should be certainty." *Vallejo* is cited in R. SPEIDEL, R. SUMMERS & J. WHITE, *COMMERCIAL AND CONSUMER LAW* 656 (2d ed. 1974).

Commenting on Hugo Grotius' contribution to modern legal philosophy, Michel Villey of the University of Paris states:

Mais l'Europe moderne a cessé de s'intéresser à la justice (au sens aristotélien du mot). Elle a désormais d'autres buts. Cette métamorphose du droit répond aux desirs, aux besoins de la classe bourgeoise commerçante, de sécurité dans la richesse et les transactions commerciales; d'un droit réglementé rigide, aux solutions prévisibles.

M. VILLEY, *LA FORMATION DE LA PENSÉE JURIDIQUE MODERNE* 623 (1975).

nose. Mindful of the Shavian holy man's probable reaction against the nap-disturbing creature, one may inquire of the apocryphal barrister whether he could live with a rule which stipulated something like "no legal fees may be charged or collected for appearances before this court," or the equally ominous, "your client, despite his status as a holder in due course, is subject to all of defendant's real and personal defenses." The point is not only that one should be suspicious of appearances but also that there are some definite limits to the types of rules with which a commercial lawyer can live. Where his clients' interests are concerned, livability is generally defined by what is a profitable business practice, as reflected in course of dealing, usage of trade, and custom. For this reason the predictability of customary law is not derived from its formal enactment into law, codal or decisional, but rather from the fact that customary law, more than any other source, reflects what merchants do and think ought to be done. Courts recognize the principle that "good business practice makes good law."¹⁴⁷ It could be stated with equal conviction and factual support that good business practices, those which are widespread and tested, hardly need a legal restatement to become predictable among merchants. Thus, certainty or predictability for merchants does not come from the official formulation of a rule, but from the fact that the rule coincides with their own well-trodden practice path. This path, however, may have been cleared without having in mind a specific type or various types of disputes; or the path may have been conceived of as an exclusive passageway, allowing only merchants, or those in a given group or class of merchants, to travel it safely. These are the situations where commercial law, in its pure and "civilized" fashion, earns its keep.

Commercial practices are usually formulated in the form of principles and not of rules. Rules, as Professors Hart and Sacks tell their Harvard students,¹⁴⁸ are the most precise of legal directives; they require for their application a determination of the happening or non-happening of events, or determinations of fact.¹⁴⁹ Principles are more general and abstract, not being expressed in terms of the happening or non-happening of events. They describe the result that ought to be achieved and include, either expressly or impliedly, a statement as to why it ought to be achieved.¹⁵⁰ Consider, for example, a principle well-established in letter of credit law: "[C]ompliance

147. *In re Portland Newspaper Pub. Co., Inc.*, 271 F. Supp. 395, 400 (D. Ore. 1967).

148. H. HART, JR. & A. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* 155 (1958).

149. *Id.*

150. *Id.* at 159.

with the terms of the credit must be strict; there is no room in letter of credit law for documents which are almost the same as stated or which will do just as well."¹⁵¹ This principle clearly encourages a business practice that requires diligent verification of the presented documents to ascertain that on their face, as contrasted with verifications based upon the underlying transaction, there is compliance with the credit terms. Assume that the credit called for the presentation of an invoice describing the merchandise as "hydrogen peroxide" and the submitted invoice described it as H₂O₂. Conceivably, the court could invoke the principle of strict compliance and reject the presentation of such an invoice. Yet, the principle does not require the banker to be a brainless checking machine of corresponding letters and punctuation; it assumes that the checker must use his judgment, if for no other purpose, to determine *what is* and *what is not* a "strict" compliance or *what is* and *what is not* the "same" document. Moreover, the principle and the practice it is based upon do not prescribe the rejection of a description which, although nominally different, is in fact the same as requested in the credit—a similarity, incidentally, which the bank establishes not by looking at the underlying transaction, but by construing the meaning of "hydrogen peroxide" on its face. Thus, a court that would apply the principle of strict compliance to the above factual situation, thinking that it embodies the rule of rejection, would be confusing the forest for the trees. It is precisely with respect to such a type of rule-making that Dean Hamel, a French commercial and banking law expert, said that "commercial equity would rebel" (*l'équité commerciale s'insurge*).¹⁵² Hamel's reference to the commercial source of the equity is appropriate because the purported rule's inconsistency has its origin in banking practice and in the market's standard of fairness. Good commercial law-making in such a situation consists of fashioning a rule or rules to take care of the unforeseen dispute in a manner consistent with the principle in question, as well as with related practices and principles. Good commercial lawyering does not consist of the syllogistic application of general principles to facts; nor does it require an assumption that commercial law principles are universal in

151. See the landmark decision of *Equitable Trust Co. v. Dawson Partners*, 25 Lloyd's List L.R. 90 (1926) (Eng.); 27 Lloyd's List L.R. 52 (1926) (Eng.). The case is discussed in B. KOZOLCHYK, *COMMERCIAL LETTERS OF CREDIT IN THE AMERICAS* 416-20 (1966).

152. Hamel, *Reflexions sur le Crédit Documentaire*, in *SWEDISH ASSOCIATION FOR MARITIME LAW, LIBER AMICORUM OF CONGRATULATIONS TO ALCOT BAGGE* 108 (1955). "Contre ce principe d'autonomie, s'il est poussé à l'extreme, l'équité commerciale s'insurge." *Id.* at 111.

For a contemporary discussion of the same theme, see Epschtein & Bontoux, *Reflexions sur le Formalisme du Crédit Documentaire*, 1972 *REVUE DE LA BANQUE* 396 (Belg.).

nature, applicable *urbi et orbi*. Rather, good commercial lawyering consists of the meticulous qualification or disqualification of parties as protected participants in the relevant practice. It would be a poor commercial lawyer who assumes that anyone who looked and acted as a bona fide purchaser of property, holder in due course, or creditor with a perfected security interest is such. The adjudication of commercial law is a process of characterization of the parties' protected or unprotected status.¹⁵³ In such a process there is always room for considerations *ex aequo et bono*.¹⁵⁴

If the conflict involves competing business practices and principles or results from a widespread commercial practice which exploits the contractual weaknesses of consumers, the relevant equity is civil. Its civil nature is derived from the adjudicator's reliance on principles general enough to encompass the interests of competing business groups and consumers, as well as merchants.

Civil equity is particularly apparent in court decisions emanating from important trading centers, cutting across the entire spectrum of commercial transactions. German courts have used the doctrines of abuse of rights, good customs (*boni mores*), and good faith in business associations law, exploitive agency, distributive agency, distributorship agreements, and in commercial-consumer relationships.¹⁵⁵ French courts have relied upon the abuse of rights doctrine in suits to curb the power of majority stockholders and

153. Speidel, Summers and White make an insightful observation on the present state of decisional negotiable instruments law in the United States:

One who reads many holder in due course cases will soon discover that the usual issue is not over the legal rights of a holder in due course but over whether the plaintiff is a holder in due course. That is, the drawer, maker, indorser or such says: "You are not a holder in due course because you are not a holder, because you did not give value, because you had notice or for some other reason." Seldom is there serious quarrel about the legal consequences if the plaintiff can establish his status as a holder in due course.

R. SPEIDEL, R. SUMMERS & J. WHITE, *supra* note 146, at 1298.

154. Or, as stated by the United States Court of Appeals for the First Circuit, there is "some leaven in the loaf of strict construction." *Banco Español de Crédito v. State Street Bank and Trust Co.*, 385 F.2d 230, 234 (1st Cir. 1967).

155. See, e.g., R. SCHLESINGER, *supra* note 53, at 478-84, 490-97 (translation of German court decisions). See also Dawson, *supra* note 31, (pt. 2) at 65-72.

The Louisiana courts have likewise been shown to be sympathetic to the problems of consumers who have dealt with a more knowledgeable creditor. See Hersbergen, *On the Necessity or Desirability of Consumerism-Inspired Revision of the Louisiana Civil Code—A Summary of Research Undertaken and Tentative Conclusions Reached*, 10 REVUE GÉNÉRALE DE DROIT 29 (1979) (Can.). Professor Hersbergen's research has in fact established that virtually all of section 2-302's "unconscionable" contracts cases involving consumers have Louisiana Civil Code decisional equivalents. Hersbergen, *supra*, at 71-73.

upon tort principles in actions for unfair competition;¹⁵⁶ courts in the United States have applied similar doctrines when annulling overreaching terms in installment sales and in secured transactions, or where economic duress has lead to a grossly disproportionate exchange of values.¹⁵⁷

Resort to commercial and civil equitable principles of adjudication is, therefore, inevitable with respect to many rules, principles and practices. Moreover, resort to commercial and civil equity, contrary to conventional wisdom, renders commercial law not less, but more, predictable. Commercial equity reinstates the market standard of fairness where it was rejected or perverted by poor adjudication. Civil equity prevents a distorted or one-sided application of the market standard where one practice is preferred over another, or where a weak consumer is deemed to possess the same bargaining power of a trade group for reasons other than everyone's common good. By balancing the results of an unequal bargaining power, civil equity helps restore a reliance in legal (orderly and stable) methods of doing business.¹⁵⁸

The Brotherly Standard of Fairness and Commercial Law Institutions

Another aspect of the civilization of commercial law which is not well understood is the role of the brotherly standard of fairness, as apparent in the family duties of a good father of the family,¹⁵⁹ in the formation and development of commercial legal institutions. Richard Baxter's *Christian Directory*, which R. H. Tawney describes as one of the most widely read books in late seventeenth century England,¹⁶⁰ and which was intended to be a *Summa Theologica and Moralis* for cities "like Rome or London and not for a fool's paradise,"¹⁶¹ contains advice which Tawney paraphrases as follows:

156. For an example of a French court decision using the abuse of rights doctrine to protect minority stockholders from majority stockholders' actions, see Cueto Rua, *supra* note 46, at 1102 n.106. For application of this principle to unfair competition litigation, see Derenberg, *The Code and Unfair Competition*, in *THE CODE NAPOLEON* 177, 188 (B. Schwartz ed. 1956).

157. See authorities cited at notes 91 & 92, *supra*.

158. For a description of the effects of abusive contractual stipulations and collections practices in Costa Rica and its displacement of "official" legal institutions and of certainty of collection, see Kozolchyk, *Toward a Theory on Law in Economic Development: The Costa Rican U.S. AID—ROCAP Law Reform Project*, 1971 *LAW AND SOCIAL ORDER* 681, 714-35.

159. See text at notes 57-62, *supra*.

160. R. BAXTER, *A CHRISTIAN DIRECTORY* (1677), cited in R. TAWNEY, *supra* note 41, at 183.

161. R. TAWNEY, *supra* note 41, at 184.

The Christian, he insists, is committed by his faith to the acceptance of certain ethical standards, and these standards are as obligatory in the sphere of economic transactions as in any other province of human activity. To the conventional objection that religion has nothing to do with business—that “every man will get as much as he can have and that caveat emptor is the only security”—he answers bluntly that this way of dealing does not hold among Christians. Whatever the laxity of the law, the Christian is bound to consider first the golden rule and the public good. “It is not lawful to take up or keep up any oppressing monopoly or trade, which tends to enrich you by the loss of the Commonwealth or of many.”

He must carry on his business in the spirit of one who is conducting a public service; he must order it for the advantage of his neighbor as much as, and, if his neighbor be poor, more than, for his own. He must not desire “to get another’s goods or labour for less than it is worth.”

Rivalry in trade, Baxter thinks, is inevitable. But the Christian must not snatch a good bargain “out of greedy covetousness, nor to the injury of the poor . . . nor . . . so as to disturb that due and civil order which should be among moderate men in trading.”¹⁶²

Despite its wide readership, it is Tawney’s conclusion that Baxter’s *Directory* succeeded even less than the “Popes and Doctors, whose teaching, not always unwittingly [it] repeated.”¹⁶³ A cursory review of commercial law developments since mid-eighteenth century English commercial law, however, makes one wonder whether Tawney’s dismissal of the brotherly standard should have been as unqualified. Justice Story’s 1846 comparative study of the law of bailments, for example, shows that English and American law adopted the same division of slight and great diligence on the part of the bailee that prevailed in European law:

[W]hen the bailment is for the sole benefit of the bailor, the law requires only slight diligence on the part of the bailee and of course makes him answerable only for gross neglect. When the bailment is for the sole benefit of the bailee, the law requires great diligence of the bailee and makes him responsible for slight neglect. When the bailment is reciprocally beneficial to both parties, the law requires ordinary diligence on the part of the bailee, and makes him responsible for ordinary neglect.¹⁶⁴

162. *Id.* at 185.

163. *Id.* at 188.

164. J. STORY, COMMENTARIES ON THE LAW OF BAILMENTS, WITH ILLUSTRATIONS FROM THE CIVIL AND THE FOREIGN LAW §§ 22-25 (4th ed. 1846).

J. W. Smith's *Compendium of Mercantile Law*¹⁶⁵ quotes an 1809 admiralty decision on the duties of a shipmaster as follows:

[A] ship is in a foreign country, where there is no correspondent of the owners, and no money to be had on hypothecation to put her into repair; under these circumstances what is to be done? The ship may rot before the master can hear from his owners; and therefore if the necessity were clearly shown, with full proof that everything was done *optima fide*, for the real benefit of the owners, the Court might be disposed to sustain a purchase so made.¹⁶⁶

In 1810, an appellate court in New York held that when a seller resold merchandise wrongfully refused by the buyer, the sellers were

by necessity defendants' trustees to manage [the merchandise]; and being thus constituted trustees or agents, of the defendants, they must either abandon the property to destruction, by refusing to have any concern with it, or take a course more for the advantage of the defendant by selling it. There is a strong analogy between this case and that of the assured, in case of an abandonment. In both cases, the party in possession is to be considered an agent to the other party, from necessity.¹⁶⁷

In *Price v. Neal*,¹⁶⁸ decided in 1762, Lord Mansfield held that a drawee of two forged bills of exchange who paid one and accepted the other could not collect monies paid to the payee because the drawee had the duty "to be satisfied 'that the bill drawn upon him was [of] the drawer's hand,' before he accepted or paid it."¹⁶⁹ Such a duty of inquiry did not weigh upon the holder who had given value innocently. Lord Mansfield admitted that the drawee could have been similarly innocent; yet he concluded that "there is no reason to throw off the loss from one innocent man upon another innocent man."¹⁷⁰ In placing the loss and failure of diligence squarely on the drawee's shoulders, Lord Mansfield had fashioned a duty of diligence of far reaching consequences in the relations between banks, as drawees, and holders of checks drawn on the banks.

By the early nineteenth century, a standard of good faith to

165. J. SMITH, *COMPENDIUM OF MERCANTILE LAW* 241 (3d ed. 1873), quoting Fanny and Elmira, 165 Eng. Rep. 1052 (1809).

166. J. SMITH, *supra* note 165.

167. *Sands v. Taylor*, 5 Johns. Ch. 595, 4 Am. Dec. 374, 377 (N.Y. 1809).

168. 3 Burrow's Reports 1354 (1762) (Eng.), quoted in P. THAYER, *THE LAW MERCHANT* 588-90 (1939).

169. P. THAYER, *supra* note 168, at 590, quoting *Price v. Neal*, 3 Burrow's Reports 1354 (1762).

170. *Id.*

govern the relations between the trustee and the beneficiary had been adopted in the law of trusts, a standard which was higher than that of ordinary contracting parties in the market place.¹⁷¹ Justice Cardozo referred to this standard as *uberrima fides* and described it as follows:

Some relations in life impose a duty to act in accordance with the customary morality and nothing more. In those, customary morality must be the standard for the judge. *Caveat emptor* is a maxim that will often have to be followed when the morality which it expresses is not that of sensitive souls. Other relations in life, e.g., those of the trustee and beneficiary, or principal and surety, impose a duty to act in accordance with the highest standards which a man of the most delicate conscience and the nicest sense of honor might impose upon himself. In such cases to enforce adherence to those standards becomes the duty of the judge.¹⁷²

The above rules concerning bailments for the benefit of the bailee, powers of a shipmaster under calamitous circumstances, powers of a seller at the time of the buyer's breach, diligence of a drawee paying a draft with a forged signature, and the exercise of good faith by trustees have certain common elements. The first element in common is entrustment. The bailee, shipmaster, seller, drawee and trustees have all been entrusted with someone else's goods or services for a given purpose. In some instances the entrustment is voluntary; in others, such as in the case of the right of the shipmaster and seller to sell or resell, the entrustment stems from the law. The second element is that the entrustment is part of the professional or commercial activities of the trustee. It is, to be sure,

171. See 1 J. PERRY, A TREATISE ON THE LAW OF TRUST AND TRUSTEES § 401 (1929). Perry compiles citations to eighteenth and nineteenth century decisions for rules as such. *Id.* at § 401 n.1. A trustee, having accepted a trust, cannot renounce it. He cannot free himself from liability by mere renunciation. He must be discharged by a court of equity or by a special power in the instrument of trust, or by the consent of all the parties interested in the estate, if they are *sui juris*. *Id.* "A trustee is bound to exercise ordinary care and judgment, and it is no excuse for him that he did not possess them; by accepting a trust, whether gratuitous or not, he undertakes that he does possess and will exercise them." *Id.*

Note that although the trustee is said to be bound by a standard of "ordinary care," such a standard according to the quote is exacted even where the trust is gratuitous. Furthermore, as stated by the Florida Supreme Court in *Kay v. Bostwick*, 83 Fla. 308, 310, 91 So. 112 (1922), "[t]rustees are designated for fiduciary services, and their controlling duty is faithful and efficient conservation of the trust. Compensation to the trustees, when permissible, is for services rendered to the trust; and it should be reasonable with prime reference to conserving the trust." (Emphasis added.)

172. B. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 109-10 (1921).

not an imposition of a totally altruistic or brotherly conduct. The imposed duties enhance the trustee's ability to do business either by allowing him to re-employ his efforts in the most commercially reasonable manner, or by increasing his trustworthiness in the commercial community, or both.

The third common element is the imposition of a duty of diligence and a requirement of good faith on the trustee. This duty is not predicated on what most merchants would do when acting with a view to their own advantage, but rather on what is in the best interests of both parties, or the entrusters. As the degree of entrustment increases, so does the stringency of good faith. In a situation of maximum entrustment, such as when the trustee acts in a self-interested manner with the beneficiary's property, the standard is strictest. As stated in *In re James*, "[w]hen, however, the trustee acts in his own interest in connection with the performance of his duties as trustee, the standard of behavior becomes more rigorous. In such a case, his interest must yield to that of the beneficiaries."¹⁷³

The combination of an agreed upon or legally imposed entrustment with the imposition of duties of diligence and good faith higher than those prevailing in the market still constitutes the best formula for inducing reliance on commercial legal institutions. Such a reliance is a prerequisite to the development of the institution. Legislators, courts, and doctrinal writers will refine the commercial institution in vain if those who participate in the basic transaction, whether it is a sale of goods, a loan of money or an investment in a profit sharing enterprise, do not trust or rely on each other. Sometimes the chosen trustee, a personification of Goldschmidt's honest merchant or Llewellyn's decent and reasonable merchant, is a well-established commercial institution such as a bank or insurance company. Sometimes, however, as it occurs with one of the most common forms of obtaining consumer credit in Latin American urban centers, the trustee is not an established commercial institution but the most respected and trusted person in a given neighborhood, such as the Mexican widows and "mothers of families" who run a pool known as "La Tanda" in Mexico City.¹⁷⁴ They will organize the

173. 86 N.Y.S.2d 78, 89-90 (1948).

174. See P. Karon, *Law, Fairness and Non-Institutional Credit in Mexico*, at 7-13 (Dec. 11, 1976) (unpublished paper in University of Arizona, College of Law, Foreign Law Collection).

Comparable methods for the pooling of funds of borrowers without access to established or official lending sources were observed by the author in Costa Rica. See C. Knight, J. Finch & B. Kozolchyk, *Law and Consumer Credit in Costa Rica* (Dec. 1969) (unpublished manuscript in University of Arizona, College of Law, Foreign Law

pooling of money by collecting weekly or monthly contributions, determine the manner in which the lottery, raffle or loan approval procedure will be conducted, and disburse loan moneys and collect repayment. They will be entitled to a first draw and may even be entitled to subsequent preeminent rights; in exchange they are responsible to the contributors with their own funds when a given borrower fails to repay his loan.¹⁷⁵ The analogy to the powers and duties of the French Civil Code's good father of the family, when dealing with property of those under his care, is clear and significant.

CONCLUSIONS

The commercialization of civil law implies the elimination of unnecessary formality, an increase in the cooperation and trustworthiness of contracting parties, and the protection of the rights of third parties, such as secured creditors and bona fide purchasers, whose participation is essential in the functioning of a marketplace. Commercialization is the product of utilitarian morals or of the enlightened self-interest of the regular participants in the marketplace. The civilization of commercial law consists in raising the morality of the marketplace by relying on a more altruistic standard of fairness, designed to protect regular as well as non-regular market participants.

The pressures to commercialize and civilize are relentless and never ending. On the one hand, today the family estate is made more accessible to commercial creditors;¹⁷⁶ and, on the other, a very substantial number of transactions that just a few years ago would have qualified the holder of the paper as a holder in due course do so no more.¹⁷⁷ Although it would seem that a critical point has been reached in the commercialization-civilization interaction and that the time for final and irreversible decisions is near, in effect this is but another manifestation of social man's ancient dilemma, as described by Hillel, the Jewish sage: "If I am not for myself who will be for me, and if I am only for myself, what am I?" Even if this dilemma

Collection). Section 2, part B of this study describes methods comparable to those in Mexico. Similar pooling methods were described to the author by Dominican Republic lawyers and anthropologists.

175. P. Karon, *supra* note 174, at 9.

176. See, e.g., Pascal, *Louisiana 1978 Matrimonial Regimes Legislation*, 53 TUL. L. REV. 105 (1978), where it is stated: "Under the only provision relating to liabilities during the regime, any obligation of either spouse, conventional or nonconventional, antenuptial or postnuptial, entitles the creditor to obtain execution out of the community assets and the separate assets of the debtor spouse." *Id.* at 113-14.

177. See authorities cited in notes 1-7, *supra*.

cannot be satisfactorily resolved, and chances are that it cannot, nevertheless, there is solace in what has been learned by examining the commercial-civil interaction. Not only has it helped discern the morality that underlies private law but also that which makes private law *possible*.

